Following the hearing, at which Mr. Smith and two employer witnesses testified, the Referee found claimant did not establish a "necessitous and compelling reason for leaving employment at the time the claimant did or that the claimant acted with ordinary common sense and made a good faith effort to preserve the employment." Referee's Decision/Order (December 28, 2018). The Referee noted that claimant informed his employer that he could not complete the tasks of the new job. *Id.* Further, the Referee found "claimant acknowledged that his employer requested a new note from his doctor outlining the current medical restrictions." *Id.*

II. Argument

A. Mr. Smith's Due Process Rights Were Violated When the Hearing Proceeded Without the Spanish-Interpreter He Requested.

Due process of law must be afforded in all administrative agency hearings. *See Knox v. Com., Unemployment Comp. Bd. of Review*, 317 A.2d 60, 62 (Pa. Commw. Ct. 1974). The Commonwealth Court has remanded or reversed where a citizen in an administrative agency hearing was not afforded all of his due process rights. *See Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Comp. Bd. of Review*, 309 A.2d 165, 168 (Pa. Commw. Ct. 1973). The right to be heard, which encompasses the right to aid from an interpreter during an administrative proceeding, is included in "the constitutionally protected rights afforded by due process, which apply to administrative proceeding[s]." *Bethlehem Area Sch. Dist. v. Zhou*, 976 A.2d 1284, 1286 (Pa. Commw. Ct. 2009) (citing *Commonwealth v. Pana*, 364 A.2d 895 (Pa. 1976); *Gonzalez v. Com., Unemployment Comp. Bd. of Review*, 395 A.2d 292 (Pa. Commw. Ct. 1978)).

Mr. Smith's right to be heard in his proceeding was violated when the Referee hearing was conducted without the Spanish-interpreter he had requested. The Commonwealth Court has stated that a Referee hearing fails to meet the demands of due process if the claimant demonstrates "either a specific deprivation of his rights or a lack of fairness that tainted the entire

proceeding." *Gonzalez v. Comm., Unemployment Comp. Bd. of Review*, 395 A.2d 292, 295 (Pa. Commw. Ct. 1978). In *Gonzalez*, the claimant, "who speaks only Spanish," argued that he "was denied a full and fair hearing because of inadequate interpretive services." *Id.* The Court looked to the record to see if the translator "ever refused a request by Claimant to translate or explain," if the "translator was incompetent," or if the "referee in any way impeded Claimant's ability to utilize the translator's skills." *Id.* As the record revealed that the claimant "was allowed access to, and permitted to testify through, a translator who was present throughout the entire proceeding," the Court held that the interpreter's skills met the demands of due process. *Id.*; *see also Moran v. Comm., Unemployment Comp. Bd. of Review*, 427 A.2d 303, 304-5 (Pa. Commw. Ct. 1981) (relying on *Gonzalez* to reject claimant's argument that he was denied a full and fair hearing when he used his own interpreter, not an official interpreter, because the record did not indicate that the translator ever refused a request by claimant to translate, "was incompetent, or the claimant's use of the translator['s] skills was impeded.").

Further, when a claimant has argued after the hearing that there was a language barrier issue during the hearing, the Commonwealth Court has evaluated the claim based on whether the claimant requested an interpreter for the hearing and whether the transcript indicates the claimant had any difficulty. *See Botikotiko v. Unemployment Comp. Bd. of Review*, No. 873 C.D. 2018, 2019 WL 97832 (Pa. Commw. Ct. Jan. 4, 2019). In *Botikotiko*, the claimant argued he was unable to participate fully in the Referee hearing because he "was at many times unable to express himself during the hearing" due to a language barrier, as English is his second language. *Id.* at *5. The Board considered claimant's request for a new hearing because of the language barrier and found that he was not entitled to a new hearing because the "claimant was apprised on the notice of hearing to contact the Referee's office if he needed an interpreter. He did not do

so." *Id.* The Court reaffirmed the Board's finding because the transcript did not reveal that claimant experienced any communication difficulties. *Id.* at *6. The Court also noted that the claimant failed to both "raise any issue regarding the need for an interpreter" during the hearing and offered "no specific examples as to how any purported language difficulty obstructed his ability to fully present his case before the referee." *Id.*

By contrast, here, Mr. Smith requested a Spanish-interpreter before the hearing. *See* Notice of Hearing. The Referee impeded Mr. Smith's ability to utilize the interpreter's skills because the hearing proceeded without the Spanish-interpreter the claimant had requested. There was never clear confirmation that claimant could fully participate in the hearing without the interpreter. If anything, the claimant confirmed he needed an interpreter. Referee noted that "we have an interpreter here on the Notice, but there is no interpreter here. Did you need…". Trans. at 2. Mr. Smith responded, "If not, I'll ask for one." *Id.* The Referee did not follow up with a question clarifying whether the claimant was again asking for an interpreter and whether he needed the interpreter he had requested for the hearing. The Referee only questioned, in English, whether claimant understood his rights to be represented and present testimony under Unemployment Compensation Law. *Id.*

The transcript of his hearing also reveals many instances of how he was obstructed from fully presenting his case because of his inability to understand what the Referee was asking him. Throughout the hearing, Mr. Smith quickly responded before the Referee had formed a question. *Id.* at 3; 7; 8; 11; 12; 13. He also responded with the same response that he "couldn't do the job" when repeatedly asked by the Referee whether the nature of the separation was a voluntary quit or a leave of absence. *Id.* at 5. All of these instances in the transcript indicate that he did not fully understand what he was responding to and had communication difficulties in the hearing. Unlike

Gonzalez, Moran, and *Botikotiko* where the Commonwealth Court found due process rights were not violated, Mr. Smith's hearing transcript reveals a specific deprivation of his right to be heard that impacted his ability to have a full and fair hearing.

B. Mr. Smith Provided Competent Evidence that He Voluntarily Quit His Job Due to Health Reasons and His Inability to Complete the Duties of the New Position.

Mr. Smith provided competent testimony at the hearing to meet his burden that he voluntarily quit his job for necessitous and compelling health reasons. The Supreme Court of Pennsylvania has clearly established that "medical problems can create necessitous and compelling cause to leave employment" within the meaning of Section 402(b). *Deiss v. Unemployment Comp. Bd. of Review*, 381 A.2d 132, 135 (Pa. 1977). For a claimant to establish health problems as a compelling reason to quit, the claimant must (1) "offer competent testimony that adequate health reasons existed to justify the voluntary termination, (2) have informed the employer of the health problems and (3) be available to work if reasonable accommodations can be made." *See Lee Hosp. v. Unemployment Comp. Bd. of Review*, 637 A.2d 695, 698 (Pa. Commw. Ct. 1994) (citing *Genetin v. Unemployment Comp. Bd. of Review*, 451 A.2d 1353 (Pa. 1982)). The claimant can establish his compelling reason for voluntarily quitting using "any competent evidence," which "may consist of the claimant's own testimony and/or documentary evidence." *See Steffy v. Com., Unemployment Comp. Bd. of Review*, 45 A.2d 591, 594 (Pa. 1982). The Supreme Court of Pennsylvania has held that the "claimant does not necessarily have to present expert medical evidence in order to establish that he had compelling medical reasons." *Id.* If the claimant fails to establish any one of the three requirements, he is barred from receiving unemployment compensation. *Lee Hosp.*, 637 A.2d at 698.

Once an employee communicates to his employer his inability to perform his regular duties because of his medical condition and remains available for suitable work, "the employee ha[s] demonstrated a good faith effort to maintain the employment relationship…and it is incumbent upon the employer to provide suitable work for the employee." *Waste Mgmt. v. Unemployment Comp. Bd. of Review*, 651 A.2d 231, 236 (Pa. Commw. Ct. 1994). Further, the Commonwealth Court has held that if the employer cannot provide "suitable work for the employee, the employee's subsequent voluntarily termination will be deemed the result of a necessitous and compelling cause." *Id.*

Here, the testimony in the Referee hearing from both Mr. Smith and his employer and the documentary evidence of the July 17, 2018 doctor's note all establish that he made a good faith effort to maintain the employment relationship, meeting the Commonwealth Court's three requirements for a necessitous and compelling voluntary health quit. First, the claimant testified that he returned to work the day after his three-month FMLA leave ended, during which time he had heart surgery. *See* Doctor's Note; Trans. at 8; 10-11. Claimant previously had three operations on his legs. Trans. at 7. Mr. Smith stated that he was unable to perform the duties of the new valet position and the additional walking that the job required because "my legs wouldn't let me" do it and he was having "chest pains and everything." *Id.* at 5; 10-12. Mr. Scott testified that the claimant could not continue working in the valet position because "it would kill him," supporting claimant's testimony that adequate health reasons existed for the voluntary quit. *Id.* at 6.

Second, Mr. Smith also informed Jay's Auto Group of his ongoing health problems. Claimant made his employer aware of his heart problems when he provided the employer with the July 17, 2018 letter from his doctor, which indicated that he could not work for three

months due to ongoing cardiac issues. *See* Doctor's Note; Trans. at 10-11. When claimant was experiencing chest and leg pains in his new valet position, after returning back from FMLA leave and trying the job for over a week, he informed Mr. Scott and Mr. Taylor that he could not perform the job. Trans. at 5-6; 10-11. Mr. Smith then asked Mr. Scott and Mr. Taylor "for light duty work." Trans. at 14. Mr. Smith testified that he thought he was returning to his old maintenance position and performing "light duty work, which I was fine with," thus meeting the third requirement that claimant was able and available to complete light duty work. *Id.* at 11.

Further, the transcript does not support the Referee's finding that Mr. Smith acknowledged in the hearing that his employer requested a new doctor's note detailing his medical restrictions. *Id.* at 15. When asked by the Referee if there was an understanding with his employer that he would get more information from his doctor, claimant stated, "Never. He just – everything's in the file, his file."[2] *Id.* Mr. Smith only testified in the hearing that he provided a doctor's note to his employer after returning from FMLA leave, which indicated that he had no medical restrictions on returning to his previous position as a maintenance worker. *Id.* at 10-11. Even if Mr. Smith's employer asked him to obtain an additional doctor's note, his case is distinguishable from those where the Commonwealth Court found a claimant ineligible under Section 402(b) for failing to provide the employer with a doctor's note specifying the claimant's limitations.

In *Fox v. Commonwealth of Pennsylvania, Unemployment Compensation Board of Review*, the Commonwealth Court affirmed the Board's decision finding claimant ineligible

[2] As discussed in Section A, the Referee hearing proceeded without the Spanish-interpreter claimant had requested. In a follow up question on the additional doctor's note, the Referee was only able to ask the claimant, "So, did he ask you to…". Trans. at 15. Before the Referee could finish and indicate what the question was about, claimant immediately said, "Yes." Trans. at 15. Claimant's response should not be interpreted as an acknowledgment of the employer's request for a doctor's note, but as another example of the communication difficulties in the hearing.

under Section 402(b) where the claimant provided her employer with a doctor's note for her absence, but the doctor's note "did not contain a list of…limitations" and "[c]laimant never explained her limitations to Employer." 522 A.2d 713, 715 (Pa. Commw. Ct. 1987). The Court stated that the claimant had an obligation to communicate the medical problems because "only through communication can an employer be afforded an opportunity to accommodate a claimant's problem by offering suitable work." *Id.; see also Bonnani v. Comm., Unemployment Comp. Bd. of Review*, 519 A.2d 532, 548-49 (Pa. Commw. Ct. 1986) (finding claimant ineligible under Section 402(b) when she failed to provide employer with a more specific doctor's note because without knowing what "claimant can and cannot do," the "employer can[not] make a reasonable accommodation.").

Unlike *Fox* and *Bonnani*, Mr. Smith notified his employer of his medical conditions when he went on a three-month FMLA leave for heart surgery and told Mr. Scott and Mr. Taylor that he was experiencing chest and leg pains in the new valet position. *See* Doctor's Note; Trans. at 5-6; 10-11; 14. When Mr. Smith informed his employer that he needed "light duty work" and asked for his old maintenance position back because of his health, he was told that the maintenance position no longer existed. Trans. at 10-11; 14. Mr. Smith was also told that the valet job was the "only job we have available and it's the least demanding job that we have available" that is full-time. *Id*. Since Mr. Smith remained available for light-duty work and the employer could not provide him with suitable light-duty work, Mr. Smith demonstrated a good faith effort to maintain the employment relationship.

III. Conclusion

For the aforementioned reasons, the claimant respectfully requests that the Board of Review grant a remand hearing for the claimant to have a full and fair hearing with a Spanish-

interpreter. The claimant also respectfully requests that the Board of Review reverse the Referee's decision and find the claimant eligible for benefits under Section 402(b) of the Pennsylvania Unemployment Compensation Law.

Respectfully submitted,

Sabrina Merold

Sabrina Merold
Employment Advocacy Project
The University of Pennsylvania Law School
3501 Sansom Street
Philadelphia, PA 19104

Applicant Details

First Name	**Austin**
Middle Initial	**D**
Last Name	**Michel**
Citizenship Status	**U. S. Citizen**
Email Address	**austin-michel@uiowa.edu**
Address	**Address** Street **210 SW 11th Street, Apt 316** City **Des Moines** State/Territory **Iowa** Zip **50309** Country **United States**
Contact Phone Number	**5635807985**

Applicant Education

BA/BS From	**University of San Diego**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Iowa College of Law** **http://www.law.uiowa.edu**
Date of JD/LLB	**May 14, 2021**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Iowa Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Moot Court Competition**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Williams, CJ
cj_williams@iand.uscourts.gov
319-286-2340
Yockey, Joseph
joseph-yockey@uiowa.edu

References

The Honorable C.J. Williams, CJ_Williams@iand.uscourts.gov, 319-286-2344
Professor Joseph Yockey, joseph-yockey@uiowa.edu, 319-335-9883
Professor Mary Ksobiech, mary-ksobiech@uiowa.edu, 205-292-6829

This applicant has certified that all data entered in this profile and any application documents are true and correct.

AUSTIN D. MICHEL
915 Oakcrest Street, Unit 1, Iowa City, IA 52246 ● (563) 580-7985 ● austin-michel@uiowa.edu

April 21, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
701 East Broad Street, Suite 5318
Richmond, Virginia 23219

Dear Judge Hanes:

I am writing to apply for the 2022-2024 term clerkship in your chambers. I am a third-year student at the University of Iowa College of Law and Senior Online Editor for the *Iowa Law Review*. I am particularly interested in a clerkship in your chambers as I will be taking the Virginia Bar this July and hope to someday practice in the Richmond area.

I believe my educational and professional experience would allow me to quickly take on a meaningful role in your chambers. Currently, my GPA is 3.73 and I rank in the top 12.5% of my class. Last semester, I received the Jurisprudence Award for Academic Excellence for my research paper on international parental leave policies. In addition, I have written an extensive note on the intersection of federal employment discrimination and export control laws that will be published in the upcoming issue of the *Iowa Law Review*. This semester, I am continuing to develop my research and writing skills as an extern for U.S. District Judge C.J. Williams. As an extern, I draft opinions on both civil and criminal matters, redline opinions drafted by Judge Williams and his clerks, and regularly attend court proceedings. This coming year, I hope to build upon these experiences and further hone my research and writing skills while clerking for Judge Anuradha Vaitheswaran on the Iowa Court of Appeals.

Enclosed please find my resume, writing sample, law school transcript, list of references, and letters of recommendation from the Honorable C.J. Williams and Professor Joseph Yockey. I am also available for either an in-person or virtual interview, to be scheduled at your convenience. Thank you in advance for your consideration, I look forward to speaking with you soon.

Respectfully,
Austin D. Michel

AUSTIN D. MICHEL

915 Oakcrest Street, Unit 1, Iowa City, IA 52246 ● (563) 580-7985 ● austin-michel@uiowa.edu

EDUCATION

University of Iowa College of Law — Iowa City, Iowa
GPA 3.73 | Class Rank: 16 of 144 (Top 12%) — May 2021
Honors: Jurisprudence Award for Academic Excellence
Activities: Senior Online Editor, *Iowa Law Review*; National Moot Court Team; Environmental Law Society
Publication: "Hiring in the Export Control Context: A Framework to Explain How Some Institutions of Higher Education are Discriminating Against Job Applicants," 106 IOWA L. REV. (Forthcoming 2021).

University of San Diego, B.A. Psychology — San Diego, California
GPA 3.86 (*Summa cum laude*) | USD Honors Program — May 2016
Honors: National Society of Collegiate Scholars; USD Outdoor Adventures Guide of the Year; *Psi Chi*
Activities: Lead Guide, USD Outdoor Adventures; Course Instructor, Emerging Leaders; Treasurer, Garden Club
Publication: "Student Leadership Identity Development, The Potential for Stage-Regression," Senior Honors Thesis

EXPERIENCE

Iowa Court of Appeals — Des Moines, Iowa
Judicial Clerk to the Honorable Anuradha Vaitheswaran — Beginning August 2021

United States District Court, Northern District of Iowa — Cedar Rapids, Iowa
Judicial Extern to the Honorable C.J. Williams — January 2021 – Present

- Research and draft opinions for civil and criminal matters at various stages in the litigation process including for motions to dismiss, motions in limine, motions to vacate, and motions for compassionate release.
- Review opinions drafted by Judge Williams and his clerks to ensure all opinions are clear, concise, substantively correct, and in compliance with the Bluebook.
- Regularly attend initial appearances, pre-trial conferences, jury and bench trials, and sentencing hearings.

Ahlers & Cooney, P.C. — Des Moines, Iowa
Summer Associate — June 2020 – August 2020

- Drafted court documents for multiple civil cases, including briefs, applications for default, and proposed orders.
- Prepared research memoranda analyzing various constitutional, statutory, and administrative issues, such as mayoral emergency police powers under the Iowa Constitution and Fourth Amendment searches of a private road.
- Partnered with the local bar association to update their attorney-client fee arbitration forms and policies.

University of Iowa, Division of Sponsored Programs — Iowa City, Iowa
Contracts Intern — May 2019 – June 2020

- Drafted and negotiated over 90 research contracts with state, federal, and international entities.
- Coordinated the awarding of federal grant and contract research funds within the University.

Theisen's Home-Farm-Auto — Dubuque, Iowa
Human Resources Specialist — October 2017 – May 2018

- Managed the first online benefit enrollment for over 1200 employees, serving as the point-of-contact for employee questions and ensuring all applicants complied with insurance provider regulations and deadlines.
- Administered the company's COBRA, FMLA, and Injury Report claims for current and former employees.

City of San Diego — San Diego, California
Personnel Analyst – Management Trainee — October 2016 – June 2017

- Oversaw the recruitment process for multiple City job openings by researching and writing job postings, reviewing application materials, and conferring with hiring departments to select candidates.
- Chaired the Personnel Department's social committee, which entailed planning social events and fundraisers, facilitating bi-monthly meetings, and overseeing the committee budget.

COMMUNITY INVOLVEMENT

University Parking & Transportation Committee Member | First Year at Iowa Orientation Leader | Moot Court Judge

THE UNIVERSITY OF IOWA

Office of the Registrar Official Transcript

Name:	Austin Denn Michel
University ID:	00778823
Month/Date of Birth:	10/07
Date Generated:	04/22/21 08:23 AM

Degree(s) from other institution(s):
BA University of San Diego, San Diego, CA 2016

Previous/Transfer institution(s):
University of San Diego, San Diego, CA 2012

**********START ACADEMIC RECORD**********

Course Number	Course Title	Sem Hrs	Grade
Fall 2018 / College of Law			
LAW 8046	Torts	4.0	3.0
LAW 8032	Legal Analysis Writing and Research I	2.0	3.3
LAW 8017	Contracts	4.0	3.4
LAW 8037	Property	4.0	3.5
LAW 8026	Introduction to Law and Legal Reasoning	1.0	P

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	14.0	3.30	14.0	15.0
UI Cum:	14.0	3.30	14.0	15.0

Spring 2019 / College of Law				
LAW 8006	Civil Procedure	4.0	3.4	
LAW 8010	Constitutional Law I	3.0	3.5	
LAW 8033	Legal Analysis Writing and Research II	2.0	3.6	
LAW 8022	Criminal Law	3.0	3.8	
LAW 8645	Intro Quantitative & Computational Lg Rs	3.0	4.3	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	15.0	3.71	15.0	15.0
UI Cum:	29.0	3.51	29.0	30.0

Fall 2019 / College of Law				
LAW 8460	Evidence	3.0	3.9	
LAW 8415	Employment Discrimination	3.0	4.0	
LAW 8421	Employment Law	3.0	4.2	
LAW 9010	Appellate Advocacy I	1.0	P	
LAW 9115	Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	9.0	4.03	9.0	11.0
UI Cum:	38.0	3.63	38.0	41.0

Spring 2020 / College of Law ‡				
LAW 8622	International Environmental Law	3.0	P	
LAW 8658	Jurisprudence	3.0	P	
LAW 8670	Labor Law	3.0	P	
LAW 9021	Van Oosterhout Baskerville Mt Ct Comp	1.0	P	
LAW 9115	Law Review	1.0	P	
LAW 9874	Principles of Contract Drafting	3.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	0.0	0.00	0.0	14.0
UI Cum:	38.0	3.63	38.0	55.0

Fall 2020 / College of Law ¹				
LAW 8105	Administrative Law	3.0	3.7	
LAW 8791	Professional Responsibility	3.0	3.9	
LAW 8331	Business Associations	3.0	4.0	
LAW 9034	National Moot Court Tutorial	2.0	4.1	
LAW 9708	Intl & Comparative Labor & Employmnt Law	3.0	4.3	
LAW 9118	Student Journal Editor-Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	14.0	3.99	14.0	15.0
UI Cum:	52.0	3.73	52.0	70.0

Spring 2021 / College of Law				
LAW 8121	Adv Legal Res Methods Specialized Subj *Health Law*	1.0	IP	
LAW 8280	Constitutional Law II	3.0	IP	
LAW 9118	Student Journal Editor-Law Review	2.0	IP	
LAW 9322	Field Placement: Judicial *U.S. District Court for the Northern District of Iowa*	7.0	IP	
LAW 9322	Field Placement: Judicial	2.0	IP	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	0.0	0.00	0.0	0.0
UI Cum:	52.0	3.73	52.0	70.0

‡In spring semester of 2020, a global public health emergency required marked changes to university operations that significantly affected student enrollment, learning, and grading. Unusual enrollment patterns and grades during this period reflect the tumult of the time, not necessarily the work of individual students.

¹University operations and instruction continued to adapt to the global public health emergency. Many course offerings and modalities were impacted, which in turn may have affected an individual student's experience in each course.

**********END ACADEMIC RECORD**********

http://registrar.uiowa.edu/legends-and-keys

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

CHAMBERS OF
C.J. WILLIAMS
United States District Judge
UNITED STATES COURTHOUSE
111 SEVENTH AVENUE SE; BOX 21
CEDAR RAPIDS, IOWA 52401

(319) 286-2340
FAX (319) 286-2341

April 29, 2021

The Honorable Elizabeth Hanes
United States District Court Judge
Eastern District of Virginia

Re: Austin Michel

Dear Judge Hanes,

This letter is to recommend Austin Michel for the position of law clerk. Mr. Michel worked in my chambers as a Judicial Extern during the spring semester 2021. I highly recommend Mr. Michel as an excellent candidate for a judicial clerkship.

Mr. Michel was an outstanding intern in my chambers. His duties included drafting orders and reviewing/editing orders I and my law clerks drafted. This included work on both criminal and civil cases and included orders on motions to suppress, motions to dismiss, motions for summary judgment, and sundry other motions. Although he was with me for only four months, he was very productive and hard working. His research was thorough, his analysis sound, and his writing concise and precise. As important, Mr. Michel took advantage of the externship to learn. He watched many court proceedings and afterwards asked me piercing and thoughtful questions. Mr. Michel is a very bright and insightful person. I also found him to have a pleasant personality and a great sense of humor that made it enjoyable to have him as a member of my staff.

I believe Mr. Michel would be a valuable member of any judicial staff. Please call me if you would like to know more about Mr. Michel or have any questions.

Sincerely,

C.J. Williams, Judge
United States District Court
Northern District of Iowa

THE UNIVERSITY OF IOWA

COLLEGE OF LAW
280 Boyd Law Building
Iowa City, Iowa 52242-1113

Tel: 319-335-9883
joseph-yockey@uiowa.edu

April 22, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr. U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Austin Michel for the position of clerk in your chambers. Mr. Michel is one of the most impressive students I met this year. He is strong academically, is distinctively mature and professional, and will be coming to you with a considerable amount of relevant experience. I expand on each of these points below.

First, Mr. Michel is an exceptional student who possesses a powerful intellect. He earned an *A* in my Business Associations class, putting him near the very top of a class of 77 students. His thoughtful answers to questions show an ability to form a deep understanding of the legal implications of virtually any issue. He also communicates as clearly on paper as he does verbally. He thinks quickly on his feet, does not accept surface-level analysis, does not fall for red herrings, and exhibits well-reasoned and well-formed judgment. His strong writing skill is further evidenced by the fact that his law review Note will be published later this year.

Second, Mr. Michel's work ethic and professional judgment are inspiring. As the *Iowa Law Review*'s faculty advisor, I worked closely with Mr. Michel throughout the year in his capacity as the Senior Online Editor. I saw first-hand how Mr. Michel's humble and friendly enthusiasm inspires his peers. He treats everyone with respect and kindness, embraces collaboration, and asks appropriate questions on the rare occasion when he finds something unclear. He displayed creative problem-solving skills and important foresight in helping the senior editorial staff navigate the immense logistical challenges that the COVID pandemic posed for the journal's operations.

Finally, please note that Mr. Michel is already set to be clerking with the Iowa Court of Appeals for one year after graduation and is currently an extern with Judge Williams on the U.S. District Court for the Northern District of Iowa. He thus will be joining your office with the benefit of valuable experience formed through working with other judges and clerks. I am confident that this experience will enable him to hit the ground running as soon as he joins you and your staff. I am also confident that you will very much enjoy meeting and getting to know him. Mr. Michel is warm, generous, and has an excellent sense of humor.

In closing, Mr. Michel exhibits all the qualities of a highly promising clerk. Please accept my sincere thanks for considering his candidacy.

Respectfully yours,

Joseph W. Yockey

Professor of Law
Michael & Brenda Sandler Fellow in Corporate Law

AUSTIN D. MICHEL
915 Oakcrest Street, Unit 1, Iowa City, IA 52246 ● (563) 580-7985 ● austin-michel@uiowa.edu

This writing sample is an appellate brief I prepared for the preliminary round of the University of Iowa College of Law's moot court competition. For the competition, I represented the fictitious plaintiff-respondent, Kelly Onsumer, on the issue of Article III standing. The brief was prepared as though it were being submitted to the United States Supreme Court on appeal from the fictitious Fourteenth Circuit Court of Appeals. The brief reflects my individual analysis and writing without any outside editing or assistance.

Respectfully,
Austin D. Michel

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2019

Docket No. 2019-039

BROKLAHOMA NIGHTLY NEWS, Petitioner, v. KELLY K. ONSUMER, Respondent.	)	Brief for Respondent

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Austin D. Michel
Standing Issue

Moot Court Office
College of Law
105 Boyd Law Building
Iowa City, IA 52246
(319) 335-9075

ISSUES PRESENTED

Under the doctrine of Article III standing, does a plaintiff's increased risk of identity theft constitute an injury-in-fact that is fairly traceable to a defendant and redressable by a court when defendant selected a cheaper, less effective, security plan for their streaming application which, in turn, enabled hackers to breach the application and access plaintiff's personal information?

STATEMENT OF THE CASE

On June 15, 2017, a known criminal organization breached the video streaming application of Petitioner, Broklahoma Nightly News ("BNN"). R. at 6. The criminal organization, Shadow Network, has previously stolen and trafficked over 1.6 million credit cards. *Id.* Shadow Network was able to breach BNN's application within minutes and gain access to thousands of users' personally identifiable information, including name, date of birth, address, and credit card information. *Id.* When designing the streaming application initially, BNN had opted for the cheaper of two security packages. *Id.* at 7. While the cheaper package saved BNN $11,500, it also put the streaming application at 50% vulnerability of being hacked. *Id.* In contrast, the more expensive package would have put the application at only 15% vulnerability. *Id.*

Prior to the breach, Respondent, Kelly Onsumer, had signed up for BNN's streaming application by providing her name, address, date of birth, and credit card information. *Id.* at 8-9. After learning of the breach, Ms. Onsumer immediately purchased an identity theft protection service. *Id.* at 9. While BNN also offered customers an identity theft protection service following the breach, the service chosen by Ms. Onsumer offered better protection and a money-back guarantee if her identity was stolen. *Id.* In the months since the breach, Ms. Onsumer has been unaware of any attempts to use her personally identifiable information to commit identity theft. *Id.*

at 8. Nevertheless, she has had to vigilantly monitor her accounts and has suffered emotional distress in the form of sleeplessness, nausea, and anxiety. *Id.*

Ms. Onsumer brought suit against BNN in the U.S. District Court for the Southern District of Broklahoma on a claim of tortious conduct. *Id.* at 8-9. Ms. Onsumer sought to recover $80,000 for both the costs of her identity theft protection service and the emotional distress she continues to incur. *Id.* at 10-11. BNN moved to dismiss the claim for lack of subject matter jurisdiciton under Fed. R. Civ. P. 12(b)(1). *Id.* The district court granted BNN's motion, finding Ms. Onsumer lacked standing to pursue her claim. *Id.* at 11. Ms. Onsumer appealed the district court's decision to the Fourteenth Circuit Court of Appeals. *Id.* The Fourteenth Circuit reversed the district court's decision, finding Ms. Onsumer had alleged facts sufficient to establish standing at the pleading stage. *Id.* at 22-23. BNN then petitioned for a writ of certiorari, which this Court granted. *Id.* at 26.

SUMMARY OF THE ARGUMENT

Kelly Onsumer has alleged facts sufficient to establish the three elements of standing at the pleading stage. Ms. Onsumer meets the first element of standing because her increased risk of identity theft is an injury-in-fact that is concrete, particularized, and imminent. Ms. Onsumer's increased risk of identity theft is concrete and particularized because it is undisputed that identity theft, should it befall Ms. Onsumer, would constitute an injury that is both real and personal to her. Her risk of identity theft is also imminent because Shadow Network has both the ability to commit identify theft, as evidenced by the type of information stolen from her, and the intent to commit identify theft, as evidenced by the fact that the breach was an Identified Taking.

Ms. Onsumer meets the second element of standing because her increased risk of identity theft is fairly traceable to BNN's choice to forego an advanced security plan for a cheaper, less secure, one. Although several months have passed since the breach, Ms. Onsumer still meets the

second element as courts have found identity theft can occur a year or more after a breach. Finally, Ms. Onsumer meets the third element of standing because her injuries are redressable by the district court awarding compensatory damages for both the costs of the identity protection service and her emotional distress.

STANDARD OF REVIEW

The proper standard of review can be determined by looking to the history of appellate practice for the issue on appeal. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Since appellate courts have historically reviewed motions to dismiss for lack of standing as questions of law, *see, eg.*, *Williams v. Certain Underwriters at Lloyd's of London*, 398 F. App'x 44, 46 (5th Cir. 2010), and questions of law are reviewed de novo, *Pierce*, 487 U.S. at 558, the Court should review the motion to dismiss as a question of law, reviewed de novo.

ARGUMENT

The Court should affirm the Fourteenth Circuit's decision and remand to the district court for further proceedings because Ms. Onsumer has alleged facts sufficient to establish standing at the pleading stage. Fed. R. Civ. P. 12(b)(1) permits a district court to grant a motion to dismiss only if the court lacks subject-matter jurisdiciton to resolve the dispute. Whether a court has subject-matter jurisdiction to resolve a dispute depends, in part, on a plaintiff's ability to establish the three elements of constitutional standing that arise out of Article III's case-and-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

A plaintiff establishes standing by demonstrating (1) an injury-in-fact, (2) that is fairly traceable to the conduct of the defendant, and (3) redressable by a favorable court decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff can establish these elements at the pleading stage by providing general factual allegations that support their claim, because it is assumed such

allegations will be supported by more-specific facts at a later stage. *See Lujan*, 504 U.S. at 561. In this case, Ms. Onsumer has alleged facts sufficient to meet the three standing elements at the pleading stage because she alleges that (1) her personally identifiable information, including her credit card information and date of birth, were intentionally stolen, (2) BNN opted for a cheaper, less secure, plan that allowed Shadow Network to breach the streaming application, and (3) she has incurred damages by purchasing an identity protection service and suffering emotional distress.

A. Ms. Onsumer's Increased Risk of Identity Theft is a Concrete, Particularized, and Imminent Injury-In-Fact.

A plaintiff establishes an injury-in-fact by demonstrating the invasion of a legally protected interest that is concrete, particularized, and actual or imminent. *Id.* at 560. A future injury can constitute a concrete, particularized, and imminent injury-in-fact if it is "certainly impending" or there is a "substantial risk" the injury will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Notably, once a plaintiff establishes a concrete, particularized, and imminent injury-in-fact, any costs taken to mitigate that injury also constitute an injury-in-fact. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-55 (2010).

An injury is concrete if it is "real" as opposed to "abstract," and it is particularized if it affects the plaintiff in a personal way. *Spokeo*, 136 S. Ct. at 1548. In data breach cases, circuit courts acknowledge that identity theft, should it befall a plaintiff, is a concrete and particularized injury that is real and personal. *See, e.g.*, *Alleruzzo v. SuperValu, Inc.*, 870 F.3d 763, 770 (8th Cir. 2017). Thus, the primary issue in such cases is whether the risk of identity theft is imminent. *See Attias v. CareFirst, Inc.*, 865 F.3d 620, 626 (D.C. Cir. 2017). Circuit courts have found a plaintiff's risk of identity theft is imminent in data breach cases when hackers have both the (a) ability and (b) intent to commit identity theft. *See, e.g.*, *Attias*, 865 F.3d at 628-29.

1. Shadow Network has the ability to commit identity theft because Ms. Onsumer had her name, date of birth, and credit card information stolen

A hacker's ability to commit identity theft depends on the type of information stolen from the plaintiff. *See, e.g.*, *Alleruzzo v. SuperValu, Inc.*, 870 F.3d 763, 770-71 (8th Cir. 2017). In *Attias v. CareFirst, Inc.*, 865 F.3d 620, 627-28 (D.C. Cir. 2017), the D.C. Circuit held a hacker had the ability to commit identity theft when they gained access to the plaintiffs' names, dates of birth, unique health identifiers, credit card data, and social security numbers ("SSN"). In reaching its conclusion, the D.C. Circuit noted that, even without plaintiffs' credit card data or SSN, the hacker's access to the plaintiffs' names, dates of birth, and unique health identifiers may have been sufficient for the hacker to commit identity theft. *See id.* at 628.

Circuit courts are more divided on whether a hacker has the ability to commit identity theft when the only information stolen from a plaintiff is their name and credit card information. In *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967-69 (7th Cir. 2016), the Seventh Circuit held that a hacker had the ability to commit identity theft even when the only information stolen from the plaintiff was their name and credit card information. In contrast, the Eighth Circuit held a hacker was unable to commit identity theft when the only information they stole from the plaintiff was their name and credit card information. *See Alleruzzo*, 870 F.3d at 770. In reaching its conclusion, the Eighth Circuit emphasized that no other personally identifiable information, such as plaintiff's date of birth, was stolen in conjunction with the credit card information. *Id.*

In the present case, Shadow Network has the ability to commit identity theft because Shadow Network has stolen Ms. Onsumer's name, date of birth, address, and credit card data. This information is almost identical to the information stolen in *Attias*. The only difference is Ms. Onsumer's SSN was not stolen, which the D.C. Circuit said was not necessary to create a plausible risk of identity theft. The information also includes more than just credit card information, which

the Seventh Circuit found was alone sufficient to support a claim of identity theft. Notably, the stolen information includes Ms. Onsumer's date of birth, which is critical information the Eighth Circuit found lacking in deciding *Alleruzzo*. Thus, the information stolen from Ms. Onsumer indicates Shadow Network has the ability to commit identity theft.

2. Shadow Network also has the intent to commit identity theft because they executed an Identifiable Taking of Ms. Onsumer's information

An "Identifiable Taking" is when plaintiff's information is intentionally stolen. *Galaraia v. Nationwide Mut. Ins. Co.*, 663 F.App'x 384, 389-90 (6th Cir. 2016). Courts infer hackers intend to commit identity theft when an Identifiable Taking has occurred because "[w]hy else would hackers . . . steal consumers' private information . . . [but to] assume those consumers' identities." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015). In such cases, plaintiffs do not need to wait for a hacker to commit identity theft in order to show intent as "data has already been stolen and is now in the hands of ill-intentioned criminals." *Galaria*, 663 F.App'x at 388.

In this case, the Court can easily infer Shadow Network's intent to commit identity theft. Ms. Onsumer's information was intentionally stolen and, therefore, was subject to an Identifiable Taking. This Identifiable Taking is enough for the Court to infer Shadow Network intends to commit identity theft, even if no actual attempts at committing identity theft have occurred to date, because the information is in the hands of ill-intentioned criminals. Further evidence of Shadow Network's ill-intent is seen in the fact that the organization has trafficked over 1.6 million credit cards to date. This history of trafficking, combined with the Identified Taking, establishes Shadow Network intends to commit identity theft.

Shadow Network, therefore, has both the (a) ability and (b) intent to commit identity theft. As such, Ms. Onsumer's risk of identity theft is concrete, particularized, and, most importantly, imminent, meaning she has established the first element of standing at the pleading stage.

B. Ms. Onsumer's Risk of Identity Theft is Fairly Traceable to BNN's Decision to Implement a Cheaper, Less Effective, Security Plan.

The second element of standing assesses whether a sufficient causal connection exists between a plaintiff's injury and the defendant's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In data breach cases, courts have found a sufficient causal connection exists if the defendant failed to implement effective safeguards to protect the plaintiff's information. *See Galaria*, 663 F.App'x at 390. Notably, the causal connection can weaken with time if there are no attempts to steal plaintiff's identity for an extended period after the breach. *See Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017). Courts have found, however, that information can be held by a hacker for a year or more before it is used to commit identity theft. *See Remijas*, 794 F.3d at 694.

In this case, there is a sufficient causal connection between Ms. Onsumer's increased risk of identity theft and BNN's choice to forego a more advanced security plan for a cheaper, less secure, one. That is because, by choosing the less-secure plan, BNN failed to implement effective safeguards to protect Ms. Onsumer's information. Admittedly, a few months have passed since the breach with no known attempts by Shadow Network to use Ms. Onsumer's stolen information. However, it has still been less than a year since the breach occurred, which falls within the timeframe of when courts have found a hacker can use an individual's information to commit identity theft. As such, there is a sufficient causal connection between Ms. Onsumer's increased risk of identity theft and BNN's decision to forego the more-secure plan, meaning Ms. Onsumer has met the second element of standing at the pleading stage.

C. Ms. Onsumer's Mitigating Costs and Emotional Distress are Redressable by the Court Awarding Compensatory Damages.

The final element of standing assesses whether a plaintiff's injury can be redressed by a favorable court decision. *Lujan*, 504 U.S. at 560. In data breach cases, courts have found that a plaintiff's mitigating costs are redressable by a court awarding compensatory damages. *See, e.g.*,

Galaria, 663 F.App'x at 387, 390; *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 969 (7th Cir. 2016). Similarly, they have found that damages arising out of ongoing and future harms are also redressable by a court awarding compensatory damages. *See Remijas*, 794 F.3d at 697. In this case, Ms. Onsumer is seeking damages both for the mitigating costs she has incurred in purchasing an identity theft protection service and for the ongoing emotional distress she is continuing to incur in the form of sleeplessness, nausea, and anxiety. Since a favorable decision would permit the district court to award compensatory damages for both of these injuries, Ms. Onsumer meets the final element of standing.

CONCLUSION

Ms. Onsumer has alleged facts sufficient to establish each of the three elements of standing at the pleading stage. Her increased risk of identity theft is an injury-in-fact that is concrete, particularized, and imminent because Shadow Network has both the ability and intent to commit identity theft. Her increased risk of identity theft is also fairly traceable to BNN's failure to safeguard her information by choosing a cheaper, less secure, protection plan. Finally, the damages Ms. Onsumer has incurred in the form of purchasing an identity protection plan and suffering emotional distress are redressable by the district court awarding compensatory damages. Accordingly, Ms. Onsumer respectfully requests that this Court affirm the Fourteenth Circuit's reversal and remand to the district court with instructions that Ms. Onsumer has met the elements of standing at the pleading stage.

Applicant Details

First Name	**Grant**
Last Name	**Michl**
Citizenship Status	**U. S. Citizen**
Email Address	**gem10@duke.edu**
Address	**Address** Street **101 W 10th Street, Apt. 1008** City **Dallas** State/Territory **Delaware** Zip **19801** Country **United States**
Contact Phone Number	**6176979367**

Applicant Education

BA/BS From	**Duke University**
Date of BA/BS	**May 2017**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 15, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Law & Contemporary Problems**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Metzloff, Thomas B.
metzloff@law.duke.edu
919-613-7055
Griffin, Lisa
Griffin@law.duke.edu
919-613-7112
Rich, Rebecca
rich@law.duke.edu
919-613-7143

This applicant has certified that all data entered in this profile and any application documents are true and correct.

August 30, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship for the 2021 term. I am a third-year law student at Duke Law School and expect to receive my J.D. in May of 2021. I will be available to clerk any time after graduation.

I believe that my past experiences and skillset will allow me to excel as your clerk. In 2019, I interned for Magistrate Judge Marianne Bowler in the District of Massachusetts. There, I drafted two opinions and worked on a third as part of a team of interns. This position refined my ability to resolve legal questions both independently and collaboratively. Working in chambers and participating in the public service that the courts provide strengthened my desire to clerk.

Before law school, I was employed by the District Attorney's Office in Boston. In this role, I learned to excel in fast-paced settings that prioritize multi-tasking, organization, and preparation. During law school, I developed my legal writing skills as a staff editor for *Law & Contemporary Problems*, a law review for which I recently became an executive editor. Over this last summer, I have worked to hone these skills further through my employment with the Tax Division of the Department of Justice.

Enclosed are copies of my resume, transcripts, and writing sample. Also enclosed are letters of recommendation from Professors Thomas Metzloff, Lisa Griffin, and Rebecca Rich. Judge Bowler is also available for verbal recommendation at 617-748-9219. Please contact me at grant.michl@duke.edu or 617-697-9367 if you need any additional information. Thank you for your consideration.

Sincerely,
Grant Michl

Grant E. Michl

1500 Duke University Road, 7C
Durham, NC 27701

grant.michl@duke.edu
(617) 697-9367

80 Fernwood Road
Brookline, MA 02467

EDUCATION

Duke University School of Law — Durham, NC
Juris Doctor — Expected May 2021
GPA: 3.66
Honors: Academic Merit Scholarship
Activities: Law & Contemporary Problems, *Executive Editor*
Duke Law Innocence Project, *New Cases Team*

Duke University — Durham, NC
Bachelor of Arts in Public Policy Studies and Philosophy, *cum laude* — May 2017
GPA: 3.83
Honors: Phi Beta Kappa
Activities: Equilibria: The Duke Economics Review, *Senior Editor*
Chi Psi Fraternity, *Executive Council Member*
Mathematics Department, *Teacher's Assistant*

EXPERIENCE

U.S. Department of Justice, Tax Division, Civil Trial Section | Dallas, TX — May – Aug 2020
Summer Intern Law Program

- Hired through DOJ's competitive SLIP recruitment program for paid internships
- Assisted attorneys in affirmative and defensive civil litigation arising under internal revenue laws; drafted complaints, researched case-specific legal questions, and helped in developing litigation strategies
- Drafted several dispositive motions, including summary judgment motion in a complex tax refund action; addressed subject-matter jurisdiction and the procedural requirements of partnership-related refund claims
- Prepared research memos regarding developments in tax law, which were distributed throughout the Tax Division; topics included the application of the Stored Communications Act to tax cases and the use of disgorgement as an equitable remedy against fraudulent tax preparation businesses

The Hon. Marianne Bowler, Federal Magistrate Judge, District of Mass. | Boston, MA — May – Aug 2019
Judicial Intern

- Drafted a Memorandum and Order regarding defendant's motion to dismiss in a civil case; addressed issues of Article III standing and substantive due process
- Drafted a Memorandum and Order regarding defendant's summary judgment motion in a complex civil case; addressed issues of qualified immunity, Fourth Amendment rights, and false arrest
- Drafted a Report and Recommendation regarding a plaintiff's motion for class certification
- Attended court functions, including alternative dispute resolution sessions, detention hearings, and trials

Suffolk County District Attorney's Office, Special Prosecutions Unit | Boston, MA — July 2017 – Apr 2018
Assistant to Unit

- Aided Superior Court unit in prosecutions related to white collar crime and public corruption
- Contributed to investigations by analyzing initial evidence, suggesting pertinent subpoena targets, and reviewing subpoena returns for relevant information
- Created charts, spreadsheets, and graphics for use at Grand Jury presentations and trials
- Started spreadsheets to track cases, managed filings, and wrote reports on unit activities

The Brookings Institution, Governance Studies Division | Washington, D.C. — May – Aug 2016
Communications Intern

- Wrote articles on topics of education, technology, and elections published on the Institution's website

ADDITIONAL INFORMATION

Interests: Skiing, Boston Sports, Ancient Philosophy, Bread Baking, Animal Rights
Community Involvement: Volunteer, Humane Society of Dallas and Orange County Animal Shelter

Grant Michl
Duke University School of Law
Cumulative GPA: 3.66

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Metzloff, T.	4.2	4.5	
Foundations of Law	Boyle, J.	Credit	1	
Legal Analysis, Research, and Writing	Rich, R.	Credit	0	
Property	Purdy, J.	3.5	4.5	
Torts	Coleman, D.	3.6	4.5	

Winter 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Counselor and Client	Various	Credit	.5	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Powell, H.	3.6	4.5	
Contracts	Haagen, P.	3.4	4.5	
Criminal Law	Coleman, J.	3.3	4.5	
Legal Analysis, Research, and Writing	Rich, R.	3.7	4.5	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Adler, M.	3.4	3.0	
Antitrust	Kasper, A.	4.0	3.0	
Ethics/Law of Lawyering	Schwoerke, A.	3.5	2.0	
Evidence	Griffin, L.	4.1	4.0	
Use of Force in International Law	Dunlap, C.	3.5	2.0	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Associations	Cox, J.	Credit	4.0	
Criminal Procedure: Investigation	Griffin, L.	Credit	3.0	
Intellectual Property	Boyle, J.	Credit	4.0	
Judicial Decision-Making	Lemos, M.	Credit	3.0	

Duke Law moved to mandatory Credit/No Credit grading for the Spring 2020 semester.

Duke University School of Law
210 Science Drive
Durham, NC 27708

August 28, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Grant Michl

Dear Judge Hanes:

I am pleased to write this letter of recommendation for Grant Michl, who will graduate from Duke Law School in May, 2021.

Grant graduated cum laude from Duke University with a Bachelor of Arts in Public Policy. After graduation, he spent a year working for the Suffolk County District Attorney's office in Boston. He is the recipient of a Dean's Scholarship for academic merit based upon his excellent undergraduate career and prior work experiences. I understand why Duke awarded him this prestigious scholarship.

Grant was in my small section Civil Procedure class during his first year. It was a class of about 35 students, and Grant stood out in so many ways. He was an active participant in class discussions. He exhibited a keen interest in the litigation process. His questions and insights were thoughtful and profound.

During the summer after his 1L year, Grant interned for the Honorable Marianne Bowler, Magistrate Judge for the District of Massachusetts. He greatly benefitted from the internship, and it kindled his interest in pursuing a clerkship.

Grant has proven to be an excellent law student, starting with my Civil Procedure class, where he earned a 4.2 (second highest grade in the class). Grant has done quite well across a wide range of courses, earning strong grades in every one of his first-year courses. Indeed, each of his grades was at or above the 3.3 median. The Duke Law grading system imposes a hard cap on first-year grades requiring a 3.3 median. In my experience, few students have such consistently high grades across the curriculum. He also did well in our rigorous legal writing and research course. His strong performance continued in his second year where he received exceptional grades in both Evidence and Antitrust Law.

Grant's current GPA is 3.66 which places him near the top of the class. While Duke does not rank its students, I would estimate that Grant is within the top 10% of the class. His first-year performance landed him an editorial position on Law & Contemporary Problems. He will serve as Executive Editor during his 3L year.

Grant is is everything that a good law clerk should be. He is interested in the law and in particular the litigation process. He is a diligent and energetic worker with strong writing skills. He is engaging on both a professional and personal level.

I strongly recommend Grant to you. He will be an excellent law clerk.

Sincerely yours,

Thomas B. Metzloff
Professor of Law

Duke University School of Law
210 Science Drive
Durham, NC 27708

August 28, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Grant Michl

Dear Judge Hanes:

I am very pleased to write this letter endorsing Grant Michl's application for a clerkship in your chambers. Grant is a sharp student who has done outstanding work in both of my classes. He also has a demonstrated commitment to public service and the public interest. I am confident that he will be a superb clerk, and I hope that you will consider his candidacy.

I first got to know Grant when he was a student in my Evidence class in the fall of 2019. In the course, students evaluate the text, legislative history, and common law roots of the rules, study their development in the courts, and then apply them through practice problems. Although it is a large lecture class, it is structured to ensure regular substantive exchanges with individual students, and the evaluation process includes an assessment of written advocacy under time pressure. Grant made especially productive contributions to the class discussion and was always prepared. His 4.1 in the class was one of the very top grades, and it reflects both a high score on the objective section testing knowledge of the intricate mechanics of the rules and clear writing and astute analysis of the complex fact patterns presented in the essay section.

This spring Grant was also a student in my Criminal Procedure: Investigation class, and he again was instrumental to class discussions. The course focuses on the Fourth Amendment's restrictions on search and seizure, the Fifth Amendment's guarantee against compelled self-incrimination, and the impact of the Sixth Amendment's right to counsel on eyewitness identification procedures and questioning by law enforcement. It is a setting that prompts challenging conversations about both constitutional interpretation and criminal justice policy. Grant was careful about his participation and respectful of his fellow students, but not once did I call on him without getting precisely the analysis I hoped for. It was especially impressive when Grant maintained his level of engagement after we moved the classroom environment on line. It takes strong communication skills and the right measure of confidence to calibrate participation in a "Zoom" room with 70 students in it, but he consistently did so throughout the remaining classes in the semester. He also applied substantial effort and astute analysis to the take-home essay that was assigned at the end of the semester, notwithstanding the challenging circumstances and the pass/fail grading scale to which we converted.

During his time at Duke, Grant has also made meaningful contributions outside of the classroom reviewing applications from potential clients for the Innocence Project and serving as the Executive Editor for *Law & Contemporary Problems*. Grant has also sought out opportunities beyond campus to enhance his litigation skills and gain public interest experience. He has twice interned for Federal Magistrate Judge Marianne Bowler (as an undergraduate and a law student), has worked with the Suffolk County District Attorney's Office, and completed an internship with the Tax Division at the Department of Justice.

Grant is diligent, sincere, interesting, and civic-minded. I believe that you would enjoy meeting him, and I hope you will not hesitate to contact me if I can address any questions about his candidacy. I would be pleased to speak with you if I can provide any additional information.

Sincerely,

Lisa Kern Griffin
Candace M. Carroll and Leonard B. Simon Professor of Law

Duke University School of Law
210 Science Drive
Durham, NC 27708

August 28, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Grant Michl

Dear Judge Hanes:

I am a member of the writing faculty at Duke University School of Law and had the pleasure of teaching Grant Michl in my first-year writing course in 2018-19. I am happy to write as a reference for Grant. He is a great writer, a diligent student, and an easy-going, delightful person. He will make an excellent law clerk.

Before I review Grant's work, let me first give some background about the first-year writing course at Duke. The year-long course is called Legal Analysis, Research, and Writing. As the name implies, it includes instruction in not just the mechanics of legal writing, but also in research skills, complex analysis, and the careful construction of legal arguments. Students complete a range of writing assignments—from short outlines and office memos to trial and appellate briefs. We grade the legal writing course at Duke, which I find really promotes student engagement and skill development.

Grant did consistently well in this difficult, labor-intensive class. He finished the year in the top 25% of the class. Grant mastered the basic structure of legal writing and demonstrated thorough, well-reasoned, sound legal analysis on every assignment. And even on ungraded assignments that often result in a mediocre effort from many students, Grant took initiative to challenge himself and produce top-quality work. In addition, Grant is a very good writer. He writes clearly and demonstrates excellent attention to detail in grammar, document presentation, and citation. At the beginning of the year, Grant sometimes struggled with wordiness, but he worked hard on it all year. On his final assignment, an appellate brief dealing with a question of statutory interpretation, he wrote very efficiently and concisely.

On a personal level, Grant was a pleasure to teach. He is friendly, engaged, professional, and reliable. He came to class and participated regularly, he visited my office hours to ask nuanced questions about his assignments, and he worked hard. He was always very well-prepared, both for class and for our individual meetings in conferences and office hours. Grant is a down-to-earth, easy conversationalist. I always look forward to seeing him. I feel incredibly fortunate to get to work with students like Grant; he's a great Duke Law student.

Finally, Grant's demonstrated commitment to public service is laudable. A judicial clerkship seems to be a logical next step for him. And Grant's experience interning in Federal Magistrate Judge Marianne Bowler's chambers and working in the Special Prosecutions Unit of Boston's DA's Office after college will make his transition into clerking particularly smooth.

I am pleased to give Grant my recommendation. He will be an asset in any judicial chambers. If you have further questions about Grant, please contact me at (919) 724-2476 or rich@law.duke.edu.

Sincerely yours,

Rebecca Rich
Clinical Professor of Law and
Assistant Director of Legal Writing

Grant Michl
1500 Duke University Road, Apt. 7C
Durham, NC 27701
(617) 697-9367
grant.michl@duke.edu

Writing Sample

The following is the first draft of a Motion for Summary Judgment that I prepared while interning with the Tax Division of the Department of Justice in 2020. I researched and wrote this draft independently, such that it reflects no editing by others. I have been given permission to use it as a writing sample on the condition that I change the names of the parties and their partnership.

Plaintiffs, a married couple, held ownership interests in several partnerships. In 2009, one such partnership filed a tax return in which it claimed a net loss for the year. When plaintiffs filed their personal tax return for 2011, they reduced their tax liability by claiming the partnership's loss as a deduction. However, the IRS audited the partnership's 2009 tax return and ultimately disallowed the claimed loss. Consequently, plaintiffs were required to pay additional taxes for 2011 because they could no longer claim the partnership's loss as a deduction.

Plaintiffs later filed a claim with the IRS seeking a full refund for the additional taxes they were required to pay. The IRS should have denied this refund claim in full because the deadline for such a claim had passed over a year ago. However, the IRS mistakenly consulted a different, far longer deadline and issued plaintiffs a partial refund. Plaintiffs then brought a refund action in federal district court, seeking the remainder of their claim. The complaint omitted key details, thereby hiding the fact that their claim was time-barred. Counsel for the United States discovered this issue only after filing an answer. Having recently started my internship, I was asked to prepare this motion for summary judgment.

To comply with the page limit, I have removed the caption, summary of the argument, and conclusion. Furthermore, I have removed citations to documents on the record where possible. I am happy to send the complete document upon request.

Plaintiffs John Doe and Jane Doe ("plaintiffs") filed suit against the United States, asserting one cause of action for the refund of $59,382.49 of federal income taxes assessed and collected for the taxable year ending December 31, 2011, plus interest. The United States filed an answer in which it admitted jurisdiction. However, after the Internal Revenue Service ("IRS") examined plaintiffs' 2011 tax return in full, the United States discovered that plaintiffs had failed to timely file a refund claim with the IRS and that the Court therefore lacks subject matter jurisdiction to hear this case. Accordingly, the United States moves for summary judgment for lack of subject matter jurisdiction.

FACTUAL BACKGROUND

For all periods relevant to this case, plaintiff John Doe held a 30.25% interest in Big Apple Holdings ("Big Apple"). Big Apple is an LLC that files as a partnership for tax purposes. For taxable year 2009, Big Apple claimed a net loss of $2,504,753 on its Form 1065, Return of Partnership Income. The IRS audited this return and ultimately disallowed the claimed losses in full. It issued a Final Partnership Administrative Adjustment ("FPAA") to the Big Apple partners reflecting these adjustments on April 11, 2014. The FPAA adjustments were not challenged.

On April 6, 2015, plaintiffs filed their joint Form 1040, Individual Income Tax Return, for tax year 2011. They reduced their income tax liability by claiming a net operating loss ("NOL") carryover of $33,346,386. However, they incurred alternative minimum tax ("AMT") of $358,790.35. On June 24, 2015, the IRS issued a notice of computational adjustment to plaintiffs concerning the results of the Big Apple audit. This reduced the NOL carryover available to plaintiffs in 2011 by $2,095,663. In turn, this reduction in NOL carryover caused additional AMT of $314,349.65 to become due. The notice also stated the following:

> To dispute the computational adjustment made to your return or to assert partner-level defenses to any penalty imposed in this notice, you must pay the tax as adjusted in full,

> and then file a claim for a refund at the address provided above *within six months of the date of this letter*. . . . You may file a refund suit as provided by law if your timely-filed refund claim is disallowed or not acted upon within six months after the date it is filed.

In July 2016, plaintiffs paid the deficiency and interest through credits from their other years' income tax accounts and a cash payment of $260,241.07.

On June 1, 2017, plaintiffs filed a claim with the IRS seeking a refund of the full deficiency and interest paid. The stated basis is as follows: "Form 1040X is being filed to correct net operating loss and AMT carryovers to reflect result of IRS audit for 2009. Additionally, IDC deductions were incorrectly added back as preference items in calculation of alternative minimum tax." Although plaintiffs were over a year late in claiming a refund, the IRS erroneously allowed the claim in part. It sent plaintiffs a letter on August 11, 2017, stating that it would refund only the cash payment of $260,241.07 with interest. It denied the remainder of the claim, citing the incorrect limitations period. Rather than correctly cite the six-month deadline that had already passed, the letter stated that "the refund statute of limitation only allows us to refund payments applied to tax which were made within two year [sic] of your claim." On August 28, 2017, the IRS refunded plaintiffs an amount totaling $311,771.75.

ARGUMENT

Plaintiffs were not entitled to the $311,771.75 refund they already received and they are certainly not entitled to the remaining $59,382.49, plus interest, they now seek to recover. Plaintiffs' refund claim is subject it to the procedural rules established by the Tax Equity and Fiscal Responsibility Act ("TEFRA"). The TEFRA procedures require taxpayers to file the type of refund claim at issue here within six months after they receive a notice of computational adjustment. Plaintiffs missed this deadline by over a year. Their failure to file a timely refund claim deprives this Court of subject matter jurisdiction over this refund action.

I. The TEFRA procedures apply to plaintiffs' refund claim.

TEFRA established a "statutory scheme for dealing with partnership-related tax matters." *United States v. Woods*, 571 U.S. 31, 37 (2013). Specifically, it sets out audit and litigation procedures for partnerships and LLCs that file as partnerships. The TEFRA procedures are relevant to this case because they impose special deadlines for the filing of refund claims when they apply. Plaintiffs failed to mention TEFRA in their complaint; nevertheless, the TEFRA procedures govern their refund claim and, by extension, the Court's jurisdiction.[1]

A. The Big Apple audit was a partnership-level TEFRA proceeding.

"TEFRA requires partnerships to file informational returns reflecting the partnership's income, gains, deductions, and credits. Individual partners then report their proportionate share of the items on their own tax returns." *Irvine v. United States*, 729 F.3d 455, 459 (5th Cir. 2013) (internal citations omitted). This structure allows the IRS to "'adjust partnership items at a singular proceeding, and then subsequently assess all of the partners based upon the adjustment to that particular item.'" *Id.* (quoting *Duffie v. United States*, 600 F.3d 362, 365 (5th Cir. 2010)). "If the IRS adjusts any partnership items on a partnership's informational income tax return, it must notify the individual partners by issuing an FPAA." *Id.* at 460 (citing § 6223). Partnership items are items "more appropriately determined at the partnership level than at the partner level." 26 U.S.C. § 6231(a)(3)). They include "[i]tems of income, gain, loss, deduction, or credit of the partnership" and "each partner's share" thereof. 26 C.F.R. § 301.6231(a)(3)-1(a)(1).

[1] It should be noted that "the Bipartisan Budget Act of 2015 repealed and replaced TEFRA, and struck 26 U.S.C. § 7422(h)," the "jurisdictional provision" at issue in this motion. *Rodgers v. United States*, 843 F.3d 181, 183 n.3 (5th Cir. 2016). However, "those changes do not apply here because the Act is effective only for tax years after 2017." *Foster v. United States*, 801 Fed. App'x 210, 211 n.1 (5th Cir. 2020) (citing Pub. L. No. 114-74, § 1101, 129 Stat. 584, 625–38). All returns relevant to this suit were for years before 2017. Thus, TEFRA remains applicable.

TEFRA's role in this case begins with Big Apple. Big Apple is an LLC that files as a partnership. Accordingly, it filed an informational tax return for 2009, in which it claimed a net loss of $2,504,753. Under the definitions listed above, this claimed loss was a partnership item. The IRS conducted a partnership-level audit of Big Apple for tax year 2009 and disallowed the partnership's claimed loss through the FPAA it issued on April 11, 2014. Thus, the Big Apple audit was a partnership-level TEFRA proceeding.

B. Plaintiffs incurred their tax liability through partner-level TEFRA proceedings.

The determinations in the FPAA went unchallenged and therefore became final. After an adjustment to a partnership item becomes final, the IRS' next step under the TEFRA procedures is to "assess all of the partners based upon the adjustment." *Irvine*, 729 F.3d at 459 (internal quotes omitted). The IRS does this through "computational adjustments," which change each partner's tax liability "to properly reflect the treatment of partnership items." 26 C.F.R. § 301.6231(a)(6)-1(a)(1). This includes adjustments to "affected items," which are "any item to the extent such item is affected by a partnership item." 26 U.S.C. § 6231(a)(5).

Here, the IRS made computational adjustments to plaintiffs' tax liability to reflect the results of the Big Apple partnership proceedings. When plaintiffs filed their 2011 tax return, they reduced their tax liability by claiming an NOL carryover of $33,346,386. A portion of this figure ($2,095,663) was derived from their interest in Big Apple. When the IRS disallowed Big Apple's claimed losses, the NOL carryover available to plaintiffs decreased. Thus, the NOL carryover on plaintiffs' 2011 tax return was an affected item for TEFRA purposes. Moreover, the computational adjustment to the NOL carryover caused plaintiffs to owe AMT of $314,349.65. This tax liability was the subject of the June 1, 2017 refund claim and the current refund action.

Thus, the refund that plaintiffs seek is attributable to partnership items. Plaintiffs are therefore bound to follow the TEFRA procedures and TEFRA's unique jurisdictional requirements.

II. This Court has subject matter jurisdiction only if plaintiffs filed a timely refund claim with the IRS.

"'The United States, as a sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction.'" *Duffie*, 600 F.3d at 384 (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). District courts have jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have erroneously or illegally assessed or collected." 26 U.S.C. § 1346(a)(1). However, 26 U.S.C. § 7422(a) qualifies this waiver for tax refund actions:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and regulations of the Secretary established in pursuance thereof.

Thus, "[t]o overcome sovereign immunity in a tax refund action, a taxpayer must file a refund claim with the IRS within the time limits established by the Internal Revenue Code." *Duffie*, 600 F.3d at 384 (citing *United States v. Dalm*, 494 U.S. 596, 602 (1990)). "'A taxpayer's failure to file a timely refund claim with the IRS deprives the district court of subject matter jurisdiction.'" *Id.* (quoting *Gustin*, 876 F.2d at 488).

Section 7422(a) remains a jurisdictional pre-requisite despite speculation to the contrary. In recent years, the Supreme Court has held that some statutory procedural requirements, including time bars, do not implicate subject matter jurisdiction. *See United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006). While these cases did not address section 7422(a), some courts have interpreted them as implicating it. *See,*

e.g., *Walby v. United States*, 957 F. 3d 1295, 1299–1302 (Fed. Cir. 2020) (noting in dicta that the lower court "properly dismissed" an untimely refund claim but speculating that "under *Lexmark*, *Arbaugh*, and their progeny, the court likely did not lack subject matter jurisdiction over this claim"). Nevertheless, Supreme Court precedent holding that section 7422(a) is jurisdictional remains good law. *See Dalm*, 494 U.S. at 602 ("Unless a claim for refund of a tax has been filed within the time limits . . . a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected' §§ 1346(a)(1), 7422(a), may not be maintained in any court."). Unless and until the Court overturns *Dalm*, a timely refund claim is a jurisdictional pre-requisite. True to this conclusion, district courts continue to treat section 7422(a) as jurisdictional, citing *Dalm* while doing so. *See, e.g.*, *Hunter v. United* States, No. 3:19-CV-557-RGJ, 2020 WL 3862257, at *2 n.1 (W.D. Ky. July 8, 2020).

III. Plaintiffs failed to file a timely refund claim.

Plaintiffs allege that they filed their June 1, 2017 refund claim "within the period which such claim can be legally and timely filed." They are mistaken. Their claim would be timely only under "[t]he regular deadline," which is "two years from the date of payment or three years from the date of filing of a tax return, whichever is later." *Irvine*, 729 F.3d at 464 (citing 26 U.S.C. § 6511(a)). However, the TEFRA procedures "supplant[] the normal refund procedures" and establish a shorter filing deadline. *Id.* Their claim was untimely under this deadline.

26 U.S.C. § 7422(h) establishes a roadmap for refund claims subject to the TEFRA procedures: "No action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c)." As established, this refund action is attributable to partnership items. Thus, section 7422(h) bars it unless it falls within either section 6228(b) or section 6230(c).

First, this action does not fall within section 6228(b). This section applies when a partnership files an administrative adjustment request ("AAR") during a partnership proceeding. However, per section 6227(a), no AAR may be filed after an FPAA is issued for a taxable year. Here, no AAR was filed during the Big Apple partnership proceedings that concluded in April 2014. Also, plaintiffs' refund claim is not an AAR because it was filed after the FPAA was issued to the Big Apple partners on April 11, 2014. Therefore, section 6228(b) is inapplicable.

Second, this action fails to comply with section 6230(c). This section applies to refund claims where the IRS makes a computational error when applying the results of a partnership proceeding or erroneously imposes a penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item. Plaintiffs' refund claim may have been able to proceed under section 6230(c) because it concerns computational adjustments relating to adjustments to the Big Apple partnership items. However, this section provides that "for '[c]laims arising out of erroneous computations,' taxpayers have six months from the date of notification to bring a refund claim, rather than the normal two years." *Irvine*, 729 F.3d at 464 (quoting 26 U.S.C. § 6230(a)). Here, the IRS mailed the notice of computational adjustment to plaintiffs on June 24, 2015. The notice clearly explained that they could "file a claim for a refund" only "within six months of the date of this letter." Instead, plaintiffs filed their claim nearly two years later, on June 1, 2017. Thus, they failed to comply with section 6230(c).

Because plaintiffs' refund claim fails to satisfy the requirements of sections 6228(b) and 6230(c), section 7224(h) bars this refund action. Consequently, this court lacks jurisdiction.

IV. The United States' mistaken admission of jurisdiction is of no consequence.

While the United States would have preferred to raise this issue sooner, subject matter jurisdiction can be raised "at any stage in the litigation" and cannot be waived. *Arbaugh.*, 546

U.S. at 506; *see also Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject matter jurisdiction can never be waived or forfeited."); *Punch v. Bridenstine*, 945 F.3d 322, 330 (5th Cir. 2019) ("[S]tipulations cannot create subject matter jurisdiction."). Consequently, the United States' mistaken admission of subject matter jurisdiction in its answer is of no consequence.

The United States initially admitted jurisdiction because counsel for the United States was not aware of Big Apple or any of the partnership-level proceedings that the IRS undertook against it. Nothing in the complaint suggests that TEFRA might apply to this lawsuit; indeed, the complaint does not mention Big Apple at all. Instead, plaintiffs simply alluded to a "review and audit by the IRS" with no elaboration. Thus, it was not apparent on the face of the complaint that this claim contained TEFRA issues. Counsel for the United States discovered these issues only after a thorough review of plaintiffs' IRS filings over the past decade.

Applicant Details

First Name	**Emily**
Middle Initial	**E**
Last Name	**Miles**
Citizenship Status	**U. S. Citizen**
Email Address	**emilyeileenmiles@gmail.com**
Address	**Address** Street **1802 Key Blvd, 483** City **Arlington** State/Territory **Virginia** Zip **22201** Country **United States**
Contact Phone Number	**929-275-0741**

Applicant Education

BA/BS From	**Northeastern University**
Date of BA/BS	**May 2014**
JD/LLB From	**Drexel University Thomas R. Kline School of Law** **https://drexel.edu/law**
Date of JD/LLB	**May 1, 2021**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Drexel Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Cannan, John
jc3238@drexel.edu
Benforado, Adam
adam.f.benforado@drexel.edu
Oates, Kevin
kevin.p.oates@drexel.edu
215.571.4719

References

Aimee Kahan, alk54@drexel.edu, 215.571.4741

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emily Miles
4209 Chester Ave, C16
Philadelphia, PA 19104

August 23, 2020

The Honorable Elizabeth Hanes
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Elizabeth Hanes:

It is with great enthusiasm that I am writing to apply for the 2021 Clerkship with your chambers. I am a rising 3L at the Thomas R. Kline Drexel School of Law, graduating May 2021. My academic achievements and years of real-world experience would make me an asset to you.

As an aspiring immigration attorney, I have spent my time at law school honing the skills that will make me an effective advocate and judicial clerk. In addition to excelling in my class work, I have gained real world experience. I worked pro bono with a public interest organization and interned at a private immigration firm. The experiences taught me not only the ins and outs of immigration law, but how to work with clients most effectively. Further, I developed my legal writing skills by writing an appellate level brief that was awarded the CALI Award for Best Student Performance. I also participated in the Drexel Law Review write on process where I was selected to be a Staff Editor for Volume XIII. This coming year I will be a member of Drexel's Federal Appeals and Litigation Clinic, where I will continue to develop my legal research and writing skills by briefing and arguing cases before local courts.

Prior to law school I worked for six years as a Human Resources professional where I refined many skills that are easily transferable to the legal world. In my various roles, I was trusted with incredibly confidential information, handled sensitive conversations on a regular basis, created and implemented important programs and projects, and worked with all levels of the business. Working in high-growth start-ups taught me to function well under pressure and work quickly and efficiently with minimal guidance. I am confident I will be able to combine these skills with those I have learned in law school to be a great resource to you.

My resume, grade sheets, and writing samples are submitted with this application. I have also submitted recommendations from Professor Adam Benforado, Professor John Cannan, and Dean Kevin Oates. Thank you for your time and consideration.

Sincerely,
Emily Miles

Emily Miles

Philadelphia, PA • (929) 275 0741 • emilyeileenmiles@gmail.com

Education

Drexel University Thomas R. Kline School of Law, *Dean's List (GPA 3.71)*
Candidate for Juris Doctor, Expected Graduation May 2021

- Accelerated Juris Doctor – Two-Year Degree Program
- ***Drexel Law Review***, Staff Editor (Volume XIII)
- CALI Best Student Performance Awards in:
  - Appellate Advocacy, Criminal Law, Constitutional Law, Property, and Contracts
- Recipient of Rising Advocate Public Interest Full Scholarship Award
- Vice President of the Immigration Law Society– accepted to the Kline Border Trip during Spring Break 2020 to work at the El Paso/Mexico border (the trip was postponed due to COVID-19)
- Relevant Courses: Appellate Advocacy (upper-level writing course), Evidence, Legislation and Regulation

Northeastern University D'Amore McKim School of Business, *Magna Cum Laude*
Bachelor's Degree in Business, Concentrations in Social Entrepreneurship and Management, May 2014

Experience

Drexel Federal Appeals and Litigation Clinic, Philadelphia, PA
Forthcoming Clinic Experience, August 2020 – May 2021

- Will work directly with clients on federal appeals matters, including immigration, with professor supervision

Solow, Isbell, & Pallidino, LLC, Philadelphia, PA
Law Clerk, Summer Internship May 2020 – July 2020

- Work under the guidance of partners and other attorneys to assist in handling a variety of immigration and naturalization cases (interviewing clients, drafting affidavits and motions, completing forms)

HIAS Pennsylvania, Philadelphia, PA
Legal Intern, September 2019 – February 2020

- Conducted sensitive intake phone calls to determine if the callers qualified for HIAS's immigration legal services
- Synthesized details from intake and provided recommendations on case merits for supervising attorney

Dataminr, New York, NY
HR Operations Manager, February 2019 – July 2019

- Took on a more cross-functional role focused on high level project planning while continuing all generalist duties

HR Generalist, August 2017 – January 2019

- Supported team of 500+ employees in six offices across the US, UK, and Ireland with HR Operations needs
- Handled employment immigration processes (with outside counsel), sensitive employee relations issues, benefits, leaves, compliance, and document management

Canary, New York, NY
People Operations Manager, March 2017 – August 2017

- Handled strategic planning in the HR realm with upper level management and took on recruiting duties

People Operations Generalist, March 2015 – February 2017

- Supported a team of 100+ employees with all HR needs while managing contractors and interns
- Handled employment immigration processes (with outside counsel), sensitive employee relations issues, benefits, leaves, payroll, compliance, document management and all conversations during two reductions in force

Recruiting Coordinator, October 2014 – February 2015
Office Administrator, August 2014 – September 2014

Commonwealth Care Alliance, Boston, MA
HR Assistant, January 2014 - August 2014, June 2012 – June 2013

Emily Miles
Drexel University Thomas R. Kline School of Law
Cumulative GPA: 3.68

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Quinn	B+	4	
Contracts	Oates	A+	4	CALI Award for Best Student Performance
Criminal Law	Benforado	A	4	CALI Award for Best Student Performance
Legal Methods I	Tucker	A-	3	Legal writing course focused on memo writing

Dean's List

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Garfield	A	4	CALI Award for Best Student Performance
Legal Methods II	Cannon	B+	3	Legal writing course forcused on brief writing
Property	Kahan	A	4	CALI Award for Best Student Performance
Torts	Furrow	B+	4	

Dean's List

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy	Finklestein	A+	2	Upper level writing course focused on brief writing, CALI Award for Best Student Performance
Criminal Procedure: Investigations	Bloch-Weba	B	3	
Evidence	Oates	A	4	
Legislation and Regulation	Seligmann	B+	3	
Professional Responsibility	McGrain	A-	3	

Dean's List

Summer 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law Co-op	n/a	Pass	7	Internship for credit
Lawyering Practice Seminar	Parambath	A	2	Required course in connection with internship
Technology and Law Practice	Rich	A	3	

Dean's List

Grading System Description
The school grades on a curve. My first semester of school was May 2019 because I am in the Accelerated JD Program (2 years).

Emily Miles
Northeastern University
Cumulative GPA: 3.549

Fall 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Business		A-	4	
Calculus for Business		A	4	
Principles of Microeconomics		B-	4	
College Writing		A-	4	

Dean's List

Spring 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Financial Accounting & Reporting		B	4	
Global Env International Business		B	4	
Business Statistics		A-	4	
Intermediate French		A-	4	
Personal Skill Development for Business		A	1	

Dean's List

Fall 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Marketing		B+	4	
Financial Management		B	4	
Intermediate French 2		B+	4	
Managerial Acounting		B	4	

Spring 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Buildling Management Skills		B+	4	
Professional Development for CBA/Co-op		A	1	
Principles of Macroeconomics		B-	4	
Environmental Science		A	4	
Advanced French 1		A-	4	

Summer 1 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Dialogue - Civilization - Regional (France)		A-	4	

Advanced French Immersion 1	B+	4	
International Study: France	S	0	(Pass)

Summer 1 was spent abroad in France

Summer 2 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Co-op (Work Experience)			0	(Pass)

Co-op/internship at the MA Convention Center - Exhibitor Services Office

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Co-op (Work Experience)		S	0	(Pass)

Co-op/internship at the MA Convention Center - Exhibitor Services Office

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Management Information Systems		B+	4	
Advanced Writing in Business Administration		A	4	
Innovation!		A-	4	
Environmental Sustainability		A-	4	

Dean's List

Summer 1 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business/Econ in Latin America		A-	4	
International Study: Dominican Republic/Cuba		S	0	(Pass)
Microfinance in Latin America		A-	4	

Study abroad in Dominican Republic/Cuba

Summer 2 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Co-op (Work Experience)		S	0	(Pass)

Co-op/internship at Commonwealth Care Alliance

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Co-op (Work Experience)		S	0	(Pass)

Co-op/internship at Commonwealth Care Alliance

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Supply Chain & Operations Mgmt		A-	4	
Managing Healthcare Orgs		B+	4	

Social Entrepreneurship	A	4	
Intro to Women/Gender/ Sexuality	A	4	

Dean's List

Summer 2 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Co-op (Work Experience)		S	0	(Pass)

Co-op/internship at RAPP

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Co-op (Work Experience)		S	0	(Pass)

Co-op/internship at RAPP

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Strategy in Action		A	4	
Organizational Behavior		A	4	
Managing Human Capital		A-	4	
Advanced Studies in Social Entrep.		A	4	Including capstone/thesis in Jamacia

Dean's List

Graduated: Magna Cum Laude

Grading System Description

Northeastern was on a quarter system. We went to school year round (after the first year) with a mix of classes and co-op/ internship experiences.

John Cannan
Research and Instructional Services Librarian

June 29, 2020

Salutations

I extend my wholehearted recommendation for Ms. Emily Miles. She is without question one of the great rising stars of the legal profession and would be a great credit to your court.

I had the distinct pleasure of teaching Ms. Miles in Legal Methods. She turned in one of the class' best briefs. Her writing style exhibits clarity and incisive thought. She also gave an impressive presentation at oral argument. She was imperturbable in the face of fierce questioning and her answers were to the point and penetrating. In class, Ms. Miles showed an eagerness to participate. Her contributions advanced discussions and her questions were always on point and helped with explanations and highlights.

Both inside and outside of class, I have seen Ms. Miles as a supportive classmate. Her questions at the reference desk always exhibited an intellectual curiosity about various areas of law and a passion for detail.

Ms. Miles is without a doubt one of the best law students I have ever encountered. I also have great faith that she will be a great and dedicated lawyer. I urge you to accept her for the position to which she is applying.

Sincerely,

John Cannan

3320 Market Street, Room 433, Philadelphia, PA 19104 | Tel: 215.571.4804 | Fax: 215.571.4730
drexel.edu/kline | sgreenblatt@drexel.edu

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It's standard practice: when I write a recommendation letter for a student, I ask her to send me a copy of her resume. Most of the time, I don't find anything worth highlighting—judges, after all, will be looking at the same document and can draw their own conclusions. But when I glanced over Emily's, I noticed something I had not encountered in my twelve years as a law professor.

During her first year, Emily had been named the best student in Criminal Law, Constitutional Law, Property, and Contracts—four core doctrinal classes with four different professors grading anonymously.

Have I seen students excel in all four of these classes before? Yes, although it's rare. But to be chosen as the best in all four is a true blue moon occurrence. We, law professors, are quirky: we develop our own idiosyncratic methods to grading, we invent absurd hypotheticals for our exams, we adopt wildly different pedagogical approaches. It didn't matter to Emily: whatever was thrown her way, she knocked out of the park, beyond her classmates' best efforts, beyond the bleachers, to break windows and set off car alarms.

But this shattering grand slam is hidden in the version of her resume that Emily shared with me, buried five bullet points down, below "Relevant Courses" and "Board Member of the Immigration Law Society." And I think that says something important about Emily. She is not at law school for the prestige; she does not study to get good grades; her goal in class is not to hear the sound of her own voice or witness the nodding approval of her professor. Emily placed her membership in the Immigration Law Society and her enrollment in Appellate Advocacy first because they come first in her mind. She wants to be a great lawyer; she wants to be an advocate to help those most in need.

Although many of my colleagues duck their heads when the Dean comes looking for volunteers to teach over the summer, I love teaching in this window because it allows me the opportunity to get our early starting 1Ls, like Emily, during their first moments on campus. One of the things that always saddens me to see is how students often lose their idealism—the very impetus that drew them to law school—over the first year. They arrive hoping to change the world and give back, and end up, by May, focused on the standard protocol: getting the GPA up, filling out the resume with the right extra curriculars, passing the bar, and landing a good firm job to pay back those student loans. Given the opportunity to get to know them in their first term, I do my best to try to encourage my students not to forget why they came, to not jettison the values that they brought to their legal education, to not lose sight of what they have always thought mattered most. I'm not sure my efforts have much of an impact. The external reward mindset—and its associated model of the lawyer, dethatched, amoral—is powerful, and it may be that the students, like Emily, who are able to resist it are just different.

What's so interesting and special about Emily is that she is so successful at checking the conventional boxes while not appearing to care much about them. She is not a crusader whose passion only appears when we shift from doctrine to policy, when the conversation turns to what the law should be, when we are pondering the ethical responsibilities of a lawyer and how to create a more just system. Emily is equally adept at closely reading the Model Penal Code as she is at discussing how to address wrongful convictions and eliminate false confessions by changing interrogation procedures. She excels at identifying the holding of a case, spotting legal issues, and jumping through all of the other well-worn hoops law professors have been dangling out for 100 years, but Emily has her eyes on the horizon. She is going to make a big impact in the future.

Some judge is going to be very lucky to have her. Don't miss out. Students like her don't come along very often. Emily is remarkable.

Sincerely,

Adam Benforado
Professor of Law

Adam Benforado - Adam.F.Benforado@drexel.edu

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I take great pleasure in writing this letter of recommendation on behalf of Emily Miles's application for a judicial clerkship. I am the Senior Associate Dean of Students and Administration at the Drexel University Thomas R. Kline School of Law, where Ms. Miles is a student. I have known Ms. Miles since May 2019 when she entered the law school as a member of the law school's Accelerated Juris Doctor Program. Students in the Accelerated Program take high credit loads several semesters, attend classes during their summers, and complete law school in two years. The fact that Ms. Miles was willing to obtain a law degree at such an accelerated pace is evidence that she has a level of commitment and determination not shared by all law students.

I met Ms. Miles during new student Orientation. Upon meeting her I was struck by her maturity and drive. It was clear to me that she was committed both to succeeding academically and to actively engraining in the law school community.

My initial impressions about Ms. Miles have been borne out. She hasexcelled academically, earning superior grades, being ranked first in her cohort, making the Dean's List each semester, and being invited to join the Law Review. I also invited her to by my Dean's Scholar, basically a teaching assistant, for the first–year Contracts course I am currently teaching. The students in Contracts have reported that she has excelled in her role as a Dean's Scholar. These achievements indicate that she is highly respected by the faculty and administrators at the law school, as well as her classmates.

In addition, Ms. Mile is a very active and engaged member of the law school community, as evidenced by her becoming a Board Member of the Immigration Law Society. In that role she helped plan a trip for students to travel to the Unites States-Mexico border to advise newly arrived immigrants on their legal rights. Unfortunately, due to the pandemic, the trip was cancelled.

I have had the pleasure of having Ms. Miles as a student in two of the classes I teach. Most recently she was a student in the Evidence class I taught in the spring of 2020. Previously she was a student in my Contracts class in the summer of 2019. In Evidence, students are asked to study the Federal Rules of Evidence and come to class prepared to make arguments for, or against, the admission of certain pieces of evidence. In Contracts, students examine, among other things, the enforcement of promises and bargains, contract formation, performance and breach, defenses, and remedies. In both classes Ms. Miles was an engaged and enthusiastic student who always came to class prepared. The nature of the questions she asked and the answers she gave demonstrated that he had thought deeply about the cases and legal issues involved in the classes and their implications for both society as a whole and for individual clients. Her deep understanding of the material was evidenced by the fact she earned an A in each class.

I believe Ms. Miles has all the skills necessary to be a highly effective judicial clerk. I believe her approach to law school demonstrate that she understands that success comes from sustained effort and attention to detail. I believe she takes the job of being a law student seriously, and I fully expect she will put forth the same kind of effort into a role as a judicial clerk.

I give Ms. Miles the highest possible recommendation.

Respectfully,

Kevin P. Oates
Senior Associate Dean of Students and Administration Drexel University Thomas R. Kline School of Law

3320 Market Street, Suite 405, Philadelphia, PA 19104 | Tel: 215.571.4719 | Fax: 215.571.4763
drexel.edu/law | kevin.p.oates@drexel.edu

Emily Miles
Philadelphia, PA • (929) 275 0741 • emilyeileenmiles@gmail.com

The following writing sample is an excerpt from a final work product submitted for an upper level writing course called Appellate Advocacy. I received a CALI Award for Best Student Performance in the class.

The assignment was to write a brief for the United States Supreme Court that addressed two issues: 1) if testing a lawfully obtained key in the lock of an apartment door was a search subject to Fourth Amendment protections and 2) if there are Fifth Amendment disclosure obligations for prosecutors in the plea-bargaining stage. I represented the government and argued that there was not a search and there were not disclosure obligations. The writing sample is the Fifth Amendment argument.

II. There is no Fifth Amendment obligation for the government to disclose exculpatory evidence in the plea bargaining stage.

The Fourteenth Circuit Appeals Court erred when it found that the government violated prosecutorial disclosure obligations for exculpatory evidence in the plea bargaining stage. There are no such obligations. This Court should reverse the ruling and remand for entry of judgment in the government's favor.

The Fifth Amendment gives criminal defendants the right to a fair trial, which in turn imposes obligations on prosecutors. USCS Const. amend. V. One such obligation is established in *Brady*, where the Court ruled that prosecutors have a duty to disclose evidence favorable to a defendant a reasonable time before trial. 373 U.S. at 87. For the purposes of *Brady*, evidence favorable to the defendant encompasses both exculpatory evidence, which tends to prove the innocence of a defendant, and impeachment evidence, which tends to impeach the credibility of a witness. *Id.* Before *Brady*, a prosecutor could withhold evidence, depriving the defendant of possible defenses. *Id.* at 87-8. *Brady* remedies this unbalance by leveling the playing field, creating a fair trial for the defendant. *Id.* at 88. However, although *Brady* clarified prosecutorial obligations in a criminal trial, over 90% of criminal charges are resolved outside the courtroom through the plea bargaining process. *Ruiz*, 536 U.S. at 632. Should the *Brady* apply?

The Court addressed this question in *Ruiz* when it ruled that the *Brady* did not apply to impeachment evidence during plea bargaining. *Id.* Yet lower circuit courts are split on what to do with exculpatory evidence during plea bargaining. Several courts hold there is no disclosure obligation−that that *Brady* is only a trial right and that *Ruiz* should also apply to exculpatory evidence. *E.g.*, *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009); *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010); *United States v. Mathur*, 624 F.3d 498, 506 (1st

Cir. 2010); *Friedman v. Rehal*, 618 F.3d 142,154 (2d Cir. 2010). On the other hand, other courts argue that there is a disclosure obligation. *E.g., McCann v. Mangialardi*, 337 F. 3d 782, 787-88 (7th Cir. 2003); *United States v. Ohiri,* 133 F. App'x 555, 560 (10th Cir. 2005).

This Court has never opined on this question directly, but it has been answered indirectly through years of precedent. Such precedent implies there is no duty to disclose exculpatory evidence during plea bargaining for two reasons 1) *Brady* is a trial right and because the plea bargain is not a trial, *Brady* does not apply or 2) *Ruiz* applies to exculpatory evidence because the Court has similarly treated impeachment and exculpatory evidence. For either reason, this Court should find no prosecutorial disclosure obligations for exculpatory evidence in the plea bargaining stage. Accordingly, the lower court decision should be reversed.

A. *Brady* is a trial right that does not apply during plea bargaining. By pleading guilty Jenkins made a knowing and voluntary choice to relinquish trial rights.

Because Jenkins made a knowing and voluntary guilty plea, he cannot exploit criminal defendant trial protections like *Brady*. The government had no duty to disclose the exculpatory surveillance footage during the plea bargaining stage. The Fourteenth Circuit Appeals Court's decision should be reversed.

When a criminal defendant pleads guilty, he forgoes all trial protections, including *Brady* disclosure obligations. *Ruiz,* 536 U.S. at 629. The only protection defendant retains is that his plea must be knowing and voluntary. *Id.* Such a requirement means the defendant must know the general consequences of his plea and does not entitle him to the specific facts of the government's case. *Id.*

There is no constitutional requirement for the government to disclose impeachment evidence to a criminal defendant during plea bargaining. *Id*. at 633. In *Ruiz*, the Court accepted a defendant's guilty plea even when the prosecutor withheld impeachment information because it

found the defendant waived her trial rights with a knowing and voluntary plea. *Id.* The Court reasoned that impeachment evidence has little utility at plea bargaining because its strength cannot be measured without the specific details of the government's case, which the government need not disclose. *Id.* at 630. Accordingly, the Court found a defendant only need to know the general consequences of her plea for it to be knowing and voluntary. *Id.* A factor in the Court's decision was that the plea agreement in question safeguarded the defendant with a statement that the government provide any information that established the defendant's innocence. *Id.* at 631.

Further supporting its holding, the Court reasoned that requiring the disclosure of impeachment information created burdens for the government that outweighed any negligible benefits to the defendant. *Id.* The Court found that disclosure obligations would create undue hardships on the administration of plea bargaining process, requiring the government to use more resources to support process designed to save resources. *Id.* This was asking too much when there were already other protections that were already in place for defendants at this stage. *Id.*

Because this Court has not expressly addressed if there are pre-trial disclosure obligations for exculpatory information, some lower courts have used reasoning from *Ruiz* to find an answer. In *Conroy*, the Fifth Circuit held that a guilty plea was knowing and voluntary even though the prosecutor did not disclose exculpatory information. 567 F.3d at 178. The court denied the motion to withdraw the guilty plea, reasoning that *Brady* protections do not apply since a plea bargain is not a trial. *Id.* In *Mathur,* the First Circuit held that lack of disclosed information did not impact the defendant's ability to negotiate a plea deal. 624 F.3d at 506. The court relied on *Ruiz* to find that because *Brady* does not apply to plea bargaining, the prosecutor had no obligation to disclose exculpatory evidence. *Id.* at 507.

Further, some courts have reasoned that *Brady* should not apply to plea bargaining because the defendant has a choice to plead guilty. The Fourth Circuit suggested in *Moussaoui* that the *Brady* right is a trial right that exists to reduce the chances that an innocent person pleads guilty. 591 F.3d at 285. However, it reasoned that if a defendant makes a choice to plead guilty, those concerns are eliminated. *Id.*

Alternatively, some courts have alluded that failure to disclose exculpatory evidence during the plea bargaining stage violates *Brady*. In *McCann*, the Seventh Circuit considered that unlike impeachment evidence, exculpatory evidence may be critical for a voluntary plea. 337 F. 3d at 787-88. However, the court did not make a ruling on the matter in this case. *Id.* at 788.

The Tenth Circuit ruled similarly in an unpublished opinion, finding that exculpatory evidence was important in making a plea voluntary so it should be disclosed. *Ohiri,* 133 F. App'x at 560. These circuits are misinterpreting the plea requirements and should not be followed.

Here, the government accepted Jenkins' plea as a knowing and voluntary waiver of his trial rights and had obligation to question his strategic choices. Because he waived his trial rights, *Brady* does not apply. The government did not have to disclose the surveillance footage.

The impeachment evidence in *Ruiz* is no different than the exculpatory surveillance footage here, so the *Ruiz* holding should apply. *See Ruiz*, 536 U.S. at 630. The footage did not completely exonerate Jenkins. Instead, it showed that Jenkins went through back door of the local bar between 5:30pm and 9:15pm on January 16 and that he won trivia at the bar at 6pm. R. at 1; R. at 6. However, the fraud was attempted at 7:45pm on January 16. R. at 4. Jenkins could have easily slipped out of another door of the bar or used the computer at the bar. Or, even if Jenkins was at the bar the whole time, he could have been conspiring with Davis and thus still at fault. While the footage may support his innocence, it does not prove it.

Like the impeachment information in *Ruiz*, the footage's value rests on Jenkins's knowledge of the specific details of government's case, which the government was not required to disclose. *See Ruiz*, 536 U.S. at 630. Jenkins, who was represented by competent counsel, knew that pleading guilty would lead to his conviction. R. at 5. Like the defendant in *Ruiz*, because Jenkins knew these general consequences, his plea should be considered knowing and voluntary. 536 U.S. at 630. If Jenkins was concerned about exonerating information, he could have asked for a similar carve out for exculpatory information like the defendant in *Ruiz*. *Id.* at 631.

Jenkins is like the defendant in *Ruiz* who waived her constitutional trial rights by pleading guilty. *Id.* at 629. Accordingly, because *Brady* is a trial right, its disclosure obligations should not apply to exculpatory information in the plea bargaining stage. Requiring otherwise would make the plea bargaining process a discovery tool to help a defendant with trial preparation, removing all strategic ability from the government.

Further, the concerns about the administrative impacts that were discussed in *Ruiz* should also be considered here. *Id.* at 631. Plea bargains are instrumental to saving time and resources in the already overloaded court system. Imposing exculpatory evidence disclosure obligations will greatly slow down the plea bargaining process and push more cases to trial, which the system may not be equipped to handle. This Court should also consider the cases that would need to be opened and reviewed if an exculpatory disclosure rule went into place. Instead of creating an exculpatory evidence disclosure rule here, the Court can rely on other protections that already actively prevent government misbehavior in the plea bargaining stage. Things like internal prosecutorial guidelines and Federal Rules of Criminal Procedure keep prosecutors in check, precluding the need for an exculpatory evidence disclosure obligation during plea bargaining.

The facts here align with lower court reasoning that finds no exculpatory evidence disclosure obligations. Jenkins is like the defendant in *Conroy* waived his *Brady* rights when he plead guilty, which means like the *Conroy* defendant, his guilty plea should not be vacated. 567 F.3d at 178. And, like the defendant in *Mathur*, Jenkins's ability to negotiate a plea deal or chose to go to trial did not change just because he did not have exculpatory evidence. 624 F.3d 507. Like the *Mathur* defendant, Jenkins made a choice to plead guilty. *Id.*; R. at 7. That choice should not be undermined because he later found out about the exculpatory footage.

The Seventh and Tenth Circuit decisions that hold that *Brady* should apply to exculpatory evidence in the plea bargaining stage are wrong. *Contra*, *McCann*, 337 F. 3d at 787-88 (7th Cir. 2003); *Ohiri,* 133 F. App'x at 560. Withholding exculpatory information does not take any decision-making power away from the person considering the plea. *Moussaoui*, 591 F.3d at 285. Awareness of the general consequences of a guilty plea is enough to render it voluntary. *Ruiz*, 536 U.S. at 630. Here, Jenkins alone had the choice to plead guilty. Nothing the government did, or did not, do could force Jenkins's hand. His plea was voluntary.

Creating a non-disclosure rule for exculpatory evidence during the plea bargaining stage will not result in more innocent defendants pleading guilty. *Moussaoui*, 591 F.3d at 285. Here, like the defendant in *Moussaoui*, Jenkins made a choice to plead guilty. R. at 7. Though he maintained his innocence throughout the plea process, he decided that it would be better to take the plea then to go to trial. *Id.* The government should not be required to question a defendant's strategic decision. Accordingly, *Brady* protection is not needed in the plea bargaining stage.

Jenkins had a choice, had knowledge of the general consequences of his guilty plea, and was advised by competent counsel to plead guilty. R. at 6-7. When he plead guilty, he waived his

trial rights, including his right to *Brady* disclosure, releasing the government from any obligation to disclose the exculpatory surveillance footage.

B. In the alternative, *Ruiz* applies to exculpatory evidence because the Court has historically treated impeachment and exculpatory evidence the same.

Though *Ruiz* only expressly addressed impeachment evidence, the Court has consistently treated the two types of evidence as one. Therefore, *Ruiz* precedent applies to both exculpatory and impeachment evidence. Accordingly, the lower court ruled when it found there was a prosecutorial disclosure obligation. Its ruling should be reversed.

The Court does not rule on facts and issues not presented in a case. *See Friedman,* 618 F.3d at 154. This can be seen in *Ruiz*, where the Court held there was no obligation to disclose *Brady* style impeachment evidence during plea bargaining. *Ruiz,* 536 U.S. at 631. *Brady* evidence typically encompasses any evidence favorable to the defendant, which includes both impeachment and exculpatory evidence. 373 U.S. at 87. However, in *Ruiz* the plea agreement contained a carve out that directed the government disclose exculpatory evidence should it arise. 536 U.S. at 631. Because exculpatory evidence was not in question, it was not addressed. *Id.*

But even if a case does not address an issue, where the Court has been consistent with its reasoning, such reasoning should be followed. *See Friedman,* 618 F.3d at 154. The Court has consistently treated exculpatory and impeachment evidence as one *See e.g., Giglio v. United States,* 405 U.S. 150, 154 (1972); *United States v Bagley*, 473 U.S. 667, 676 (1985). In *Giglio,* the Court rejected a distinction between impeachment and exculpatory evidence, finding that both were material and should be disclosed under *Brady*. *Giglio,* 405 U.S. at 154. This parallelism was reinforced in *Bagley,* where a plurality opinion held that impeachment and exculpatory evidence were equally valuable in their impact on a fair trial. 473 U.S. at 676.

Further, lower courts have followed the Court's precedent that treats exculpatory and impeachment evidence as one, particularly in the context of *Ruiz*. *See e.g.*, *Friedman*, 618 F.3d at 154; *Alvarez v. City of Brownsville*, 904 F.3d 382, 394 (5th Cir. 2018). Before *Ruiz*, the Second Circuit required disclosure of both exculpatory and impeachment evidence in the plea bargaining stage. *Friedman*, 618 F.3d at 154. However, after *Ruiz*, the Second Circuit reversed, holding there were no such requirements for either kind of evidence reasoning that the reversal was required to align with the Court's similar treatment of the evidence in *Bagley* and *Giglio*. *Id.* Similarly, the Fifth Circuit interpreted *Ruiz* broadly in *Alvarez*, reasoning that because precedent does not affirmatively create one, there was no exculpatory evidence disclosure requirement in the plea bargaining stage. 904 F.3d at 394.

However, despite the Court's consistent similar treatment, some lower courts hold that the two types of evidence should be treated differently. *E.g.*, *McCann*, 337 F. 3d 782. The courts reason that impeachment evidence is empirically different than exculpatory evidence, so the Court is likely to find a constitutional violation if exculpatory evidence is withheld. *Id.*

But a decision that follows the lower court rulings that expressly defy precedent from the Court cannot be the followed. The Court has already found no prosecutorial disclosure obligations for impeachment evidence in *Ruiz*. 536 U.S. at 631. And it has a record of treating exculpatory and impeachment evidence as one. *See e.g.*, *Giglio*, 405 U.S. at 154; *Bagley*, 473 U.S. at 676. To align with precedential treatment of the types of evidence, *Ruiz* should apply to exculpatory evidence. This holding not only aligns with the Court's precedent but also supports how several circuits are already interpreting *See e.g.*, *Ruiz. See e.g.*, *Friedman*, 618 F.3d at 154; *Alvarez*, 904 F.3d at 394.

Even more, a finding that there are no prosecutorial disclosure obligations will not only be consistent with Court precedent but will also create a bright line rule that would be easy for the government to follow. Both types of evidence would have no disclosure obligations, so a prosecutor will never have to face the challenge of determining the category of evidence he is dealing with then seeing if there is a disclosure obligation for it. This saves time and resources while also setting expectations for criminal defendants.

Accordingly, if there were no prosecutorial disclosure obligations, as precedent implies, the government was right in assuming there was no requirement for it to share the surveillance footage with Jenkins. The decision of the Fourteenth Circuit Appeals Court's decision finding otherwise should be reversed.

Applicant Details

First Name	**Maureen**
Middle Initial	**H**
Last Name	**Milmoe**
Citizenship Status	**U. S. Citizen**
Email Address	**mhm100@georgetown.edu**
Address	**Address** Street **201 I Street NE Apt. 214** City **Washington** State/Territory **District of Columbia** Zip **20002** Country **United States**
Contact Phone Number	**3154208538**

Applicant Education

BA/BS From	**Hobart and William Smith Colleges**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**January 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal of Gender and the Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hoefling, Tricia
thoefling@me.com
9175968381
Zakhari, Lydia
lydia.zakhari@playerstrust.com

References

Lydia Zakhari lydia.zakhari@playerstrust.com

Tricia Hoefling, thoefling@me.com

Judge MichaelÂ A.Â Rosas, michael.rosas@nlrb.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MAUREEN H. MILMOE
201 I Street NE, Washington, DC 20002 • (315) 420-8538 • mhm100@georgetown.edu

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes,

I am a rising third year student at Georgetown University Law Center and a member of the Georgetown Journal of Gender and the Law. I am writing to apply for a 2021-23 term clerkship in your chambers. My unique work experience, academic record, and strong research skills would make me an asset to your clerkship team.

As a J.D. student at Georgetown Law, I am enrolled in several classes that will further develop my understanding of federal law, civil law, and related public-policy issues. Having graduated summa cum laude from Hobart and William Smith Colleges with a double major in Psychology and Educational Studies, I also have a strong background in general research, analysis, and document review. During my time at Georgetown Law, I have had the opportunity to participate in a legal internship at The National Football League Players Association, to support the Georgetown Law faculty as a Research Assistant, and to assist Christian Legal Aid during bi-weekly clinics. This summer, I have served as a law clerk for the National Labor Relations Board's Division of Judges. In these various roles, my responsibilities included legal research, drafting bench memos and opinions, and assisting with administrative tasks.

Since 1L fall, I have managed to perform as both a student and an employee. I remained dedicated to my legal studies while working ten to fifteen hours a week at the Georgetown Library. Also, I am scheduled to continue my work with the Georgetown Law Library this fall and participate in Georgetown's Bankruptcy Advocacy Practicum in the spring. I am a loyal and hard-working law student and would bring the same dedication to your chambers.

My current partner and I are hoping to relocate to Virginia, and I believe Richmond would be a great location for us both. I intend to practice public interest law in the area upon completion of a clerkship as well. A clerkship in your chambers would offer mentorship, a commitment to Virginia, and provide concrete experience with a unique and challenging caseload. Thank you for your consideration.

Respectfully,

Maureen Milmoe

MAUREEN H. MILMOE

201 I Street NE, Washington, DC 20002 • (315) 420-8538 • mhm100@georgetown.edu

EDUCATION

Georgetown University Law Center, Washington, D.C.
Juris Doctor, Expected May 2021
GPA: 3.04
Journal: *Georgetown Journal of Gender and the Law* – Member, *Annual Review of Criminal Procedure* – Research Assistant
Activities: Georgetown Law Public Interest Fellow; Equal Justice Foundation Member

Hobart and William Smith Colleges, Geneva, NY
Bachelor of Arts, *summa cum laude*, in Psychology & Educational Studies, May 2018
GPA: 4.06
Honors: Phi Beta Kappa Society, Psi Chi - International Honor Society in Psychology, Scandling Trustee Scholarship, William Smith Dean's List, Sharon Best '62 Cross Country Award - recognizes athletes for service
Activities: NCAA William Smith Cross Country Team, Upward Bound Tutor

EXPERIENCE

National Labor Relations Board, Washington, DC
Division of Judges, Law Clerk, May 2020 – August 2020

- Assist Administrative Law Judges with litigation related to the National Labor Relations Act
- Conduct legal research and writing regarding labor and employment disputes
- Draft portions of judicial opinions for NLRB Administrative Law Judges

Georgetown University Law Library, Washington, DC
Research Assistant, January 2020 – Present

- Support Georgetown Law faculty with legal research on a wide variety of topics
- Present a final memo after reviewing traditional print sources, Westlaw, Lexis, and other electronic databases

The National Football League Players Association, Washington, DC
The Trust, Legal Affairs Intern, June 2019 – August 2019; September 2019-December 2019

- Review and draft vendor and commercial contracts and prepare charts and presentations for The Trust
- Work with The Trust Staff Counsel to ensure organizational compliance and efficiency

Christian Legal Aid of Washington DC, Washington, DC
Intake Intern, September 2018 – August 2019

- Manage intake meetings for pro bono clients in substantive legal areas such as disability and housing

Georgetown University Law Library, Washington, DC
Digital Initiatives Assistant, September 2018 – June 2019

- Maintain library digital collections and projects. Program and digitize library materials for internet archives

Hobart and William Smith Psychology Department, Geneva, NY
Research Assistant, September 2016 – May 2018

- Investigated the role of social media use on adolescents via literature review, data entry and statistical analysis
- Publications: J. N. Kingery, [eta al.] & M. H. Milmoe, *Active Learning in a Child Psychology Course: Observing Play Behavior at a Children's Museum,* 17 PSYCHOL. LEARNING & TEACHING 209 (2018).

Legal Assistance of Western New York, Geneva NY
Legal Intern, Assistant to Disability Advocacy Division, Summer 2016

- Conducted initial interviews and reviewed client medical files as related to SSI and SSDI disability benefits

INTERESTS

- Running half-marathons, reading fiction, and practicing vinyasa yoga

Maureen Milmoe
Georgetown University Law Center

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Kevin Arlyck	B	4	
Constitutional Law I: The Federal System	Lawrence Solum	B+	3	
Legal Practice: Writing and Analysis	Jonah Perlin		2	In-Progress: Two Semester Course
Property	John Byrne	B	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Urska Velikonja	B	4	
Criminal Justice	Shon Hopwood	B	4	
How to Regulate	David Hyman	B	3	
Legal Practice: Writing and Analysis	Jonah Perlin	B	4	
Torts	Gary Peller	B	4	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Analytical Methods	Joshua Teitelbaum	B	3	
Corporations	Russell Stevenson	B	4	
Employment Law	Brishen Rogers	B	3	
Externship I Fieldwork (J.D. Externship Program)	Staff	NG	3	NG - Non-graded course
Externship I Seminar (J.D. Externship Program)	Staff	A-	1	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contemporary Bias and Law Seminar		P	2	
Employment Discrimination		P	3	
Motherhood & the Law Seminar		P	3	
Professional Responsibility		P	2	
Reproductive Rights		P	2	

P - Passing grade
F -Fail

Grading System Description
Georgetown University Law Center: Explanation of Grading System
GRADE Quality points

A+* 4.00
A 4.00
A- 3.67
B+ 3.33
B 3.00
B- 2.67
C+ 2.33
C 2.00
C- 1.67
D 1.00
F 0.00

A semester is 13 weeks of class meetings. Class periods are 55 minutes per credit.

Spring 2020 was completed by GULC Students on a Pass/Fail basis

Maureen Milmoe
Cornell University
Cumulative GPA: 3.922

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cases in Communication	Poppy McLeod	A	3	
FWS: True Stories	Charlie Green	A	3	
Introduction to Psychology	David Pizarro	A	3	
Nutrition Health & Society	David Levitsky	A-	4	
Personalized Concepts and Controversies	David Levitsky	N/A	1	

Dean's List

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Communication, Environment, Science, and Health	Meghnaa Tallapragada	A+	3	
Human Development: Adolescence and Emerging Adulthood	Anthony Burrow	A	3	
Recreational Golf	Recreational Staff	N/A	1	
The Art of Teaching	Jeffrey Perry	A+	3	
The Nature of Plants	Taryn Bauerle	A-	3	
Visual Communication	Norman Porticella	B+	3	

Dean's List

Maureen Milmoe
Hobart and William Smith Colleges
Cumulative GPA: 4.06

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Biopsychology	Ron Gerrard	A	1	
Economics: Contemporary Issues	Jonathan Davis	A+	1	
Human Growth & Development	Jennifer Harris	A+	1	
Intro to Social Psychology	Emily Fisher	A+	1	

Dean's List

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Human Sexuality	Sara Branch	A	1	
Myths & Paradoxes	Joseph Mink	A	1	
Principles of Economics	Gul Unal	A	1	
Statistics & Design	Michelle Rizzella	A	1	

Dean's List

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Beginning Dance Technique	Allison Bohman	A	1	
Independent Study	Sara Branch	A	1	PSY 450: "Advice About Relationships: The Recipient's Perspective"
Independent Study	Julie Kingery	A	1	EQIV 455: "Communication in the Legal Field"
PSY Topics: Sensation & Perception	Daniel Graham	A	1	
Research in Developmental Psychology	Julie Kingery	A	1	

Dean's List

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Research in Sensation & Perception	Daniel Graham	A+	1	
Rethinking Families	Naomi Rodriguez	A	1	
Topics in Social Psychology	Emily Fisher	A	1	

Phi Beta Kappa; Dean's List

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Economic Statistics	Joshua Greenstien	A	1	

Independent Study	Julie Kingery	A	1	EDUC 450 03: "Adolescence, Gender, Development, & Education"
Independent Study	Paul Kehle	A	1	EDUC 450 04: "Research in Developmental, Personality, & Educational Psychology"
Race Dialogues for Community & Change	Khuram Hussain	A	1	

Dean's List

Grading System Description

Hobart and William Smith Colleges are on a course unit system. Students are required to successfully complete 32 full credit units for a degree. Each full credit course carries 1.00 unit and is equivalent to 4 semester hours.

Students' transcripts include a record of each course taken at the Colleges. For the purpose of calculating grade point averages, the following designates the numerical values of various grades: A+= 4.3; A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C=2.0; C- 1.7; D+ = 1.3; D = 1.0; D- = .7; F=0. Courses taken "CR/DCR/NC" are not calculated in the GPA.

Applicant:
Milmoe
Maureen
mhm100@georgetown.edu
Georgetown University Law Center
Hobart and William Smith Colleges
Judge:
Elizabeth (displays the judge first name)
Hanes (displays the judge last name
Elizabeth Hanes (displays the judge name as it is written in the system)
The Honorable Elizabeth Hanes (displays the judge name as it is written in the system with The Honorable [ex. Honorable John Doe])
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219 (displays the judge address as it is written in the system)

Dear Judge Hanes:

It is my pleasure to recommend Maureen Milmoe to be a part of your chambers as a law clerk. I had the privilege of teaching Maureen at Georgetown Law School during the Spring of 2020, in my class on Reproductive Rights; I was immediately impressed by Maureen's intellect, work ethic and strong interpersonal skills.

Over the course of the semester, Maureen demonstrated intellectual curiosity, a keen ability to distill facts and parse issues, and a strong commitment to her work. She asked the hard questions and was not afraid to ask for clarifying information; I could always count on Maureen when I needed a student to start the discussion or venture an opinion. She sought out additional information outside of the syllabus, eagerly dug into all the optional assignments, and contributed significantly to our discussions of legally and emotionally challenging issues.

Throughout law school, Maureen did a remarkable job of managing her time. She remained dedicated to her legal studies while working fifteen hours a week at the Georgetown Library as a research assistant. Maureen has also taken an interest in legal writing and is currently a member of the Georgetown Journal of Gender and the Law, and a research assistant for the Annual Review of Criminal Procedure.

I must also mention Maureen's extraordinary interpersonal skills and ethics. She demonstrates empathy and loyalty to her classmates in our discussions. I saw her gratitude and appreciation for the Georgetown law community, and I know she values the friendships, experiences and opportunities she has gained. I am positive Maureen make significant contributions to your chambers. I would be delighted to talk further about Maureen, so please do not hesitate to reach out to me if you need any additional information.

Kind regards,

Tricia A. Hoefling

Tricia Hoefling - thoefling@me.com - 9175968381

THE TRUST
POWERED BY THE NFLPA

May 18, 2020

VIA ELECTRONIC TRANSMISSION

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

Re: Letter of Recommendation for Maureen H. Milmoe
Judicial Clerkship

To Whom It May Concern,

I am writing to recommend Ms. Maureen Milmoe most highly and enthusiastically for a post-graduate Judicial Clerkship. I serve as in-house Legal Counsel for The Trust (Powered by the NFLPA) and worked closely with, and oversaw, Ms. Milmoe in her role as Legal Affairs Intern from May through December 2019. She is a smart, articulate and passionate young woman who has an exceptionally bright future. Without hesitation, any judicial chambers would be well-served to have her as a Clerk.

Understanding the rigors of the practice of law, including my own experience as a Law Clerk, I can appreciate the qualities necessary for success, which include among others, leadership, a strong work ethic, attention to detail, dedication, and most importantly critical thinking. Ms. Milmoe undoubtedly possesses these qualities and put them to use daily during her internship. She was an invaluable member of The Trust team. I believe these assets, and many others, will add dynamically to any clerkship opportunity.

Ms. Milmoe was always exceptionally well prepared for assignments and tasks from the Legal Department and Executive Team. She timely executed upon projects ranging from contract drafting to legal research surrounding sensitive business matters. Her work product was thoughtful, thorough and of high quality. In fact, several documents and projects she spearheaded were utilized at the Board level and by Executives within the organization, as well as by affiliate entities. She is mature, highly motivated, intellectually curious, and academically talented. Ms. Milmoe's experience as an Intern served to develop her powers of analysis and academic skills at a level not often concomitant with law students. She provided strategic guidance as to business and litigation considerations, not only with her observation and insight from education and experience, but also with a level of wisdom and practical common sense.

The best law students can understand substantive issues at stake when dealing with a particular topic, know what factors are important and which questions merit the attention of professors or practitioners, and when. Ms. Milmoe has a great ability to read a wide range of materials and astutely analyze them. Additionally, she has a keen and inquiring mind, great perseverance, and commitment to excellence.

1133 20th Street NW, Washington, DC 20036 • 866.725.0063
www.playerstrust.com • info@playerstrust.com • social: @playerstrust

THE TRUST
POWERED BY THE NFLPA

Equally important, Ms. Milmoe has a winning way with people. She possesses the ability to work productively and harmoniously with individuals of wide-ranging, and sometimes opposing views. She is dedicated to using her education to build bridges with people from different backgrounds and life experiences. In addition to our diverse staff, Ms. Milmoe often worked and interfaced with active and former NFL players and business partners during her internship experience and always evidenced grace and professionalism during such interactions. Ms. Milmoe became part of the fabric of The Trust, was a pleasure to work with and continues to be a valued alumnus.

Ms. Milmoe's unwavering commitment to learning is unusually strong. She is persevering in her determination to seek solutions to challenging intellectual issues as well as practical problems arising in the fields of justice and law. Evidence of her perseverance, commitment, and maturity is her continued work as a Georgetown Law Public Interest Fellow and Equal Justice Foundation Member. Similarly, her membership on the Georgetown Journal of Gender and the Law further reflects her passion for legal writing and prose.

Ms. Milmoe is an outstanding young woman. She has the intellectual potential, commitment to service and the ability to excel at whatever she undertakes. For the reasons mentioned above, and for many more too numerous to mention in this brief letter, I am proud to recommend Maureen Milmoe for a Judicial Clerkship. If you have any further questions about Ms. Milmoe, please do not hesitate to email me at Lydia.Zakhari@playerstrust.com or contact me by phone at (202) 212-6197.

Sincerely,

Lydia A. Zakhari
Legal Counsel

1133 20th Street NW, Washington, DC 20036 • 866.725.0063
www.playerstrust.com • info@playerstrust.com • social: @playerstrust

MAUREEN H. MILMOE

201 I Street NE, Washington, DC 20002•(315) 420-8538•mhm100@georgetown.edu

WRITING SAMPLE

The following document is a segment of legal analysis that I prepared in June 2020 for my internship with the National Labor Relations Board. This paper assesses whether Matthew Hyson was improperly terminated from his job as a STEM Aide at Interns4Hire for discussing wages, travel pay, and employees' NLRA rights with a supervisor and co-workers in violation of Section 8(a)(1). This document is my own work product.

LEGAL ANALYSIS

I. THE RESPONDENT'S WAGE DISCUSSION POLICY

A. Evaluating the Lawfulness of the Rule

To assess an unlawful employer rule, the *Boeing* standard requires a determination of whether a facially neutral rule, reasonably interpreted, would potentially interfere with the exercise of Section 7 rights. *The Boeing Company*, 365 NLRB 154 (2017) (establishing a new test to evaluate a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with NLRA rights). Cf. *Cott Beverages Inc.,* 369 NLRB 82 (2020)) (policy prohibiting personal cell phones in work areas due to safety concerns lawful under *Boeing*).; *LA Specialty Produce Company,* 368 NLRB 93 (2019)(confidentiality policies and certain media contact rules lawful under *Boeing*). In cases in which facially neutral rules are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the evaluation of two factors: "(i) the nature and extent of the potential impact on rights under the Act, and (ii) legitimate justifications associated with the requirement(s)" must occur. *Boeing*, 365 NLRB, slip op. at 3. This balancing test emphasizes the "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." Id., quoting *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967).

To determine the lawfulness of the Respondents' rule prohibiting employees from discussing their wages and working conditions with each other, an assessment of whether the no-wage discussion rule, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights must be conducted, and if so, an evaluation of (i) the nature and extent of the no-wage discussion rule's adverse impact on Section 7 rights, and (ii) the legitimate business justifications associated with the no-wage discussion rule. *Boeing*, 365 NLRB, slip op. at 14.

Interns4Hire employees working at K-12 Coders jobsites were required to review, sign, and adhere to the rules in the K-12 Coders employee handbook. The K-12 Coders employee handbook was read aloud to Interns4Hire employees during training as well. The wage discussion policy prohibited Interns4Hire employees from discussing their wages and working conditions with each other.

B. *Interpreting the No-Wage Discussion Rule*

The Respondent's no-wage discussion rule, as interpreted by an objectively reasonable employee directly prohibits or interferes with the exercise of Section 7 rights. Preventing employees from disclosing the terms and conditions of their employment, such as wages, salaries, and promotions, with fellow employees is "information central to the exercise of Section 7 rights." See *LA Specialty Produce,* 368 NLRB, slip op. at 4. In this case, Hyson understood the unlawfulness of Respondent's policy and emailed a supervisor an article on the right to discuss pay at the workplace. This action indicates an employee interpreted the Respondent's no-wage discussion rule to directly interfere with the exercise of Section 7 rights. To further clarify, *Boeing* adopted three categories for employment rules. *Boeing*, 365 NLRB, slip op. at 3-4. Category 3 included "rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another." As such, the Respondent's rule prohibiting employees from discussing wages, in general, falls into the Category 3 types of rules that are per se unlawful as the rule directly prohibits or interferes with the exercise of Section 7 rights. *Boeing*, 365 NLRB, slip op. at 4.

C. The Adverse Impacts or Legitimate Business Justifications of the Rule

Since the Respondent's rule prohibiting employees from discussing wages is a type that the Board has designated as uniformly lawful, there is no need to turn to the individualized balancing test articulated in *Boeing*. The Respondent's stated justification for prohibiting employees from discussing wages, to minimize its liability exposure for employees' on-the-clock travel, is an unreasonable, unlawful effort by any business to secure compliance and directly interferes with the exercise of Section 7 rights. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 16 (2004) (no-wage discussion rule "on its face and on threat of discipline, expressly prohibiting the discussion of wages and other terms and conditions of employment, plainly infringes upon Section 7 rights and violates Section 8(a)(1)").

Based the record, the no-wage discussion rule significantly affects the exercise of Section 7 rights. The no-wage discussion rule provides no substantial and important business justifications as well. Accordingly, Respondents' maintenance of its no-wage discussion rule constitutes unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. *Boeing*, 365 NLRB, slip op. at 4, 14.

II. HYSON'S DISCHARGE

A. The Applicable Standard

Under the Act, an employer commits an unfair labor practice if it "fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that [it] proffers are pretextual." See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983). To support an inference of unfair labor practices in a mixed-motive case, the *Wright Line* standard requires "that the [General Counsel] make prima facie showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision." 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir.1981). A prima facie case requires a showing of preponderance of the evidence that: (1) Hyson was an employee of

Interns4Hire; (2) Hyson engaged in protected concerted activity; (3) Hyson's employer, Interns4Hire, was aware of the protected concerted activity via statements imputed by a supervisor; and (4) Hyson's protected concerted activity was a motivation for Interns4Hire's decision to terminate Hyson. *Wright Line,* 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir.1981).

The Respondent contends: (1) that the allegedly coercive statements were made by another employee who was not a supervisor; (2) Hyson was not an employee at the time that he was discharged; (3) Hyson was never an employee of K12Coders; and (4) in any event, Hyson sought to be discharged and was discharged after one week of employment because he was late every day that week and stole the Respondent's equipment.

B. Employee Status

The Respondent alleges Hyson was not an employee at the time that he was discharged. If Hyson is not an employee, then the Board lacks authority to address Hyson's grievance. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 89 (1995) (rights guaranteed by NLRA "belong only to those workers who qualify as 'employees' as that term is defined in the Act"). Section 2(3) of the Act provides the term employee shall include any employee. 29 U.S.C. § 152(3). In applying a broad definition of employee, it is necessary to consider the common law definition. See *SuperShuttle DFW, Inc.*, 367 NLRB 75, 258 (2019 (employee status based on "total factual …in light of the pertinent common law principles"); *Town & Country Elec.*, 516 U.S. at 94 ("Board's interpretation of the term "employee" is consistent with the common law"). Under common law, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control in return for payment. Cf. *Northwestern Univ. & Coll. Athletes Players Ass'n*, 362 NLRB 1350 (2015) (college athletes not considered employees). The common law employee framework is analyzed by assessing: (1) whether

Hyson performed service for the benefit of the employer for which he received compensation, and (2) whether Hyson was subject to the employer's control. Id.

(1) Hyson performed services for the employer's benefit

Hyson performed services for the benefit of Interns4Hire and K-12 Coders for which he received compensation. As an experienced graphic designer, his services included using the circuit machine, and teaching coding, entrepreneurship and graphic design in a K-12 Coders after-school program at Boone Elementary. Because the Respondent began placing Interns4Hire employees at K-12 Coders' locations in early 2019, and received government workforce funding as a result, Hyson's work directly benefited Interns4Hire for work at K-12 Coders' locations. In return for Hyson's services, he received $18 per hour in compensation. As such, Hyson performed services for the benefit of Interns4Hire and K-12 Coders for which he was compensated, satisfying the first prong of the common law employee analysis. Cf. *Amnesty International of the USA, Inc.,* 368 NLRB No. 112, slip op at 2 (2019) (unpaid interns did not receive or anticipate any economic compensation and therefore were not employees); *WBAI Pacifica Foundation*, 328 NLRB 1273, 1274–1276 (1999) (unpaid staff of nonprofit radio station were not employees).

(2) Hyson was subject to employer's control

Additionally, Hyson was subject to Interns4Hire and K-12 Coders control. Hyson attended a mandatory unpaid week of training at a K-12 Coders location prior to his employment. The Respondent then placed Interns4Hire employees at K-12 Coders' locations subject to the K-12 Coders employee handbook provisions. In addition, the Respondent required employees to wear K-12 Coders-branded tee shirts. Employees also had to visit the Interns4Hire Capitol Heights facility for training, to clock-in to work, and to pick up supplies for the K-12 Coders after-school programs. Finally, the Respondent required employees be responsible for

their own transportation between work locations. As a result, the location, duration and manner in which Hyson carried out his duties were controlled by Interns4Hire. The additional rules and restrictions Hyson was subject to indicate significant control over his duties with Interns4Hire. As such, Hyson was subject to Interns4Hire and K-12 Coders control, satisfying the second prong of the common law employee analysis and establishing his right to pursue a grievance against his employer. See *Northwestern Univ. & Coll. Athletes Players Ass'n*, 362 NLRB at 1363.

C. Supervisory Status

Although not alleged, an alternative defense looms based on the issue of whether Hyson is exempted from the protection of the Act because he was a statutory supervisor. Section 2(3) of the Act states that an employee "shall include any employee ... but shall not include any individual ... employed as a supervisor." 29 U.S.C. § 152(3). Because the Act's protections do not extend to supervisors, and Hyson stated his new title with Interns4Hire was STEM Aide supervisor, whether Hyson should be classified as a supervisor for purposes of the Act must be considered. See *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (recognizing that nurses must be employees not supervisors to invoke rights under the Act).

Employees will be considered supervisors within the meaning of Section 2(11) based on their authority to assign and responsibly direct employees. See e.g., *Oakwood Healthcare*, 348 NLRB 686, 693 (2006) (refining supervisory test and classifying charge nurses who exercised some, but not total, authority to be "supervisors"); see also, cf. *Croft Metals, Inc.*, 348 NLRB 38 (2006) (employees classified as "leads" in a manufacturing plant, were not supervisors); *Golden Crest Healthcare Ctr.*, 348 NLRB 39 (2006) (charge nurses at a nursing home were not supervisors). In addition, an employee's job title does not determine whether the employee is a supervisor. See *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012),

quoting *Jochims v. NLRB*, 480 F3d 1161, 1168 (D.C. Cir 2007) ("rules designating certain classes of jobs as always or never supervisory are generally inappropriate").

In this case, Hyson's position was STEM Aide supervisor, which included overseeing attendance and making sure other employees had the necessary equipment. There is no evidence, however, that the nature of his additional duties transformed him into a statutory supervisor under Section 2(11) of the Act. Accordingly, Hyson did not possess the asserted authority to assign and responsibly direct employees as a supervisor. See e.g., *Oakwood Healthcare*, 348 NLRB at 693.

(1) Hyson's ability to assign

Hyson's did not possess the supervisory authority to assign. There is little evidence Hyson's assignment ability was "anything more than "routine," i.e., it does not involve the exercise of independent judgment." *Cook Inlet Tug & Barge, Inc*., 362 NLRB 111, 1153 (2015) (tugboat captains were not supervisors because of routine work). Hyson did not assign employees to tasks at either Interns4Hire or K-12 Coders, rather he focused on collecting supplies at the Capitol Heights office, transported himself and coworkers to Boone Elementary, and primarily worked with school children teaching coding and software. Second, there is no evidence that Hyson was involved in setting the work schedules for employees. Instead the Respondent utilized the "When I Work" smartphone application to track employee attendance. Interns4Hire higher management oversees the "When I Work" function and assigned both Hyson and coworkers to a work schedule and location. As such, the functions performed by Hyson did not constitute assignment authority. Id.

(2) Hyson's ability to direct

In addition, Hyson did not possess the supervisory authority to responsibly direct other employees. To show a supervisor responsibly directs other employees the supervisor must be

accountable for the actions of those who report to them. See *Cook Inlet Tug & Barge, Inc.*, 362 NLRB, at 1153 (tugboat captains were not supervisors because of lack of responsibility). Evidence of accountability would be demonstrated through adverse consequences imposed on a supervisor which flowed from other employees' errors. See *Oakwood Healthcare*, 348 NLRB at 691-92 (charge nurses responsible for hospital units errors classified as supervisors). Here, Interns4Hire offered no specific evidence indicating Hyson was held accountable with respect to his coworkers' conduct or performance. Rather, Hyson was not subject to discipline or lower evaluations when his coworkers failed to adequately perform their duties, such as providing their own transportation to Boone Elementary. As such, the functions performed by Hyson did not constitute authority responsibly direct other employees. Based on the foregoing, the record does not support a finding that Hyson was a supervisor under Section 2(11) because he does not have authority to assign and responsibly direct. Id at 693.

Applicant Details

First Name	**Dana**
Middle Initial	**G**
Last Name	**Mirsky**
Citizenship Status	**U. S. Citizen**
Email Address	**dgmirsky@email.wm.edu**
Address	**Address** Street **2005 Glynn Springs Dr** City **Williamsburg** State/Territory **Virginia** Zip **23188** Country **United States**
Contact Phone Number	**7173321236**

Applicant Education

BA/BS From	**Mount Holyoke College**
Date of BA/BS	**May 2012**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 21, 2022**
Class Rank	**25%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Environmental Law and Policy Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Larsen, Allison Orr
amlarsen@wm.edu
(757) 221-7985
Lannetti, David Wayne
dlannetti@vanblk.com
757-446-8600

References

Professor Brendan Conner
St. Thomas University School of Law Faculty Suite (209)
16401 Northwest 37th Avenue
Miami Gardens, Florida 33054
(804) 528-0664
bconner2@stu.edu
(Professor Conner was my Legal Research and Writing professor.)

Mr. William M. Palmer
Judicial Clerk to the Honorable Lawrence R. Leonard
United States District Court, Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
(703) 615-7834 w.morganpalmer@gmail.com
(Mr. Palmer was the supervising law clerk for my internships with Judges Lannetti and Leonard.)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

2005 Glynn Springs Drive
Williamsburg, Virginia 23188
717-332-1236
dgmirsky@email.wm.edu

June 7, 2021

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, Virginia 23219

Dear Judge Hanes:

I am a rising third-year student at William & Mary Law School graduating in May 2022 seeking a judicial clerkship in your chambers for the 2022–2024 term. I am in the top 23% of my class and serve as a Notes Editor on the *William & Mary Environmental Law & Policy Review.* Also, my student Note, *Zoos, Animals, and the Law*, will be published in an upcoming issue of the *William & Mary Environmental Law & Policy Review*. The strong research and writing skills I have developed before and during law school will allow me to excel as a judicial law clerk.

For my master's degree, I researched and produced a project proposal which I then executed, analyzed, and presented as my final dissertation. I have built upon this foundation, further developing my research, writing, and analytical skills. As an intern for Judge David W. Lannetti at the Norfolk Circuit Court in summer 2020, in addition to researching and drafting memoranda, I also assisted with the drafting and editing of judicial opinions, in particular verifying the numbers and calculations used in a complex business valuation case. I also completed an externship in the chambers of United States Magistrate Judge Lawrence R. Leonard in spring 2021, during which I researched discrete legal questions on issues ranging from maritime law to professional ethics and researched and completed a full draft of a report and recommendation for a habeas corpus petition addressing claims related to double jeopardy, police coercion and denial of counsel, and ineffective assistance of counsel. As a Notes Editor for the *William & Mary Environmental Law & Policy Review* in the upcoming year, I will provide individualized feedback and assistance to 2L staff members as they research and write their student Notes.

Prior to law school, at both Busch Gardens and Maymont I worked as part of a team to manage the health and behavior of over thirty animals, organize daily guest experiences, and coordinate as necessary with other park departments. These experiences required attention to detail while keeping up with a fast-paced environment, preparing me to thrive both in and out of law school. Enclosed for your consideration are my resume, law school transcript, writing sample, references, and letters of recommendation from Judge Lannetti and Professor Allison Larsen.

Thank you for your consideration. I would be grateful for an opportunity discuss my qualifications further in an interview.

Respectfully,

/s/ Dana Mirsky
Dana Mirsky

Enclosures

DANA MIRSKY

2005 Glynn Springs Drive | Williamsburg, Virginia 23188 | (717) 332-1236 | dgmirsky@email.wm.edu

EDUCATION

William & Mary Law School, Williamsburg, Virginia
J.D. expected, May 2022
G.P.A.: 3.5, Class Rank: top 23%
Honors: ***William & Mary Environmental Law and Policy Review***, Notes Editor
CALI Award, Legal Research and Writing II
Alternative Dispute Resolution Competition Team
Activities: Agricultural Law Society, Communications Director
Student Environmental and Animal Law Society

University of Glasgow, Glasgow, Scotland
M.Sc., with merit, Animal Welfare Science, Ethics, and Law, November 2018
Honors: Dissertation: *Emotional Reactivity in the Domestic Sheep*

Mount Holyoke College, South Hadley, Massachusetts
B.A., *cum laude*, Biology, History minor, May 2012
G.P.A.: 3.66
Honors: High Honor in History
Thesis: *Re-examining the Jewish Experience Under Sasanian Rule*

EXPERIENCE

National Agricultural Law Center, Fayetteville, Arkansas expected dates: August to December 2021
Research Fellow. Will work remotely to complete legal research and writing projects related to agricultural law.

NOAA Office of General Counsel, Alaska Section, Juneau, Alaska May 2021 to present
Legal Intern. Conduct research and writing on issues concerning the protection, conservation, and sustainable use of marine environments, fisheries, protected marine species, natural and cultural heritage, and Arctic affairs.

The Honorable Lawrence R. Leonard, U.S. Magistrate Judge
United States District Court for the Eastern District of Virginia, Norfolk, Virginia January to April 2021
Judicial Extern. Researched and drafted a complete report and recommendation for a habeas corpus petition. Observed court proceedings, including detention hearings and settlement conferences.

The Honorable David W. Lannetti, Presiding Judge
Norfolk Circuit Court, Norfolk, Virginia May to August 2020
Judicial Intern. Researched, analyzed pleadings, and composed memoranda on tax law, landlord-tenant law, sovereign immunity, business valuation, statutory interpretation, and procedure. Helped prepare sentencing summaries and provided sentencing recommendations. Observed court proceedings. Assisted in writing opinions.

Maymont Foundation, Richmond, Virginia June 2019 to June 2020
Part-time Animal Keeper. Fed and shifted animals, administered medications, and deep-cleaned animal habitats. Answered guest questions and gave informative animal presentations. Trained new staff.

Busch Gardens Williamsburg, Williamsburg, Virginia June 2014 to August 2017
Animal Care Specialist. Provided daily care and training for animals in the "Highland Stables" area. Conducted guest tours and animal interactions. Collaborated with other staff to write and execute behavioral training plans.

PUBLICATION

Zoos, Animals, and the Law, 46 WM. & MARY ENV'T L. & POL'Y REV. (forthcoming 2021/2022).

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.

- Except as noted below, students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.

- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be a reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is conceivable that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.

- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

COVID-19 PANDEMIC: GRADES FOR THE SPRING 2020 TERM

In response to disruption caused by the global COVID-19 pandemic, the William & Mary Law School faculty voted to require that every course taught at the Law School during the Spring 2020 term be graded Pass/Fail. This change to Pass/Fail grading for the Spring 2020 term will impact students in our Classes of 2020, 2021, and 2022, including in the assignment of class ranks. Students in the Class of 2022 will first be assigned class ranks following completion of the Fall 2020 term. The class ranks of the students in the Class of 2021 will next be recalculated following completion of the Fall 2020 term. The class ranks of the students in the Class of 2020 will next be recalculated following completion of the Spring 2020 term.

STUDENT INFORMATION

Name : Dana G. Mirsky

Curriculum Information

Current Program

Juris Doctor

College: School of Law

Major and Department: Law, Law

***Transcript type:WEB is NOT Official ***

DEGREES AWARDED

Sought: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree

College: School of Law

Major: Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	59.000	59.000	59.000	38.000	134.60	3.54

INSTITUTION CREDIT -Top-

Term: Fall 2019

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	A-	4.000	14.80	
LAW	102	LW	Civil Procedure	B+	4.000	13.20	
LAW	107	LW	Torts	A	4.000	16.00	
LAW	130	LW	Legal Research & Writing I	A-	2.000	7.40	
LAW	131	LW	Lawyering Skills I	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	51.40	3.67
Cumulative:	15.000	15.000	15.000	14.000	51.40	3.67

Unofficial Transcript

Term: Spring 2020

Term Comments: Universal Pass/Fail grading was mandated by the faculty for all Spring 2020 Law classes due to the COVID-19 pandemic. Students had no option to choose ordinary letter grades.

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	108	LW	Property	P	4.000	0.00	
LAW	109	LW	Constitutional Law	P	4.000	0.00	
LAW	110	LW	Contracts	P	4.000	0.00	
LAW	132	LW	Legal Research & Writing II	P	2.000	0.00	
LAW	133	LW	Lawyering Skills II	P	2.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	0.000	0.00	0.00
Cumulative:	31.000	31.000	31.000	14.000	51.40	3.67

Unofficial Transcript

Term: Fall 2020

Subject	Course	Level	Title	Grade	Credit	Quality	R

					Hours	Points	
LAW	303	LW	Corporations I	B+	3.000	9.90	
LAW	370	LW	Food and Drug Law	B+	3.000	9.90	
LAW	424	LW	Environmental Law	A-	3.000	11.10	
LAW	741	LW	VA Coastal Policy Practicum I	A-	3.000	11.10	
LAW	762	LW	W&M Environ Law/Policy Review	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	12.000	42.00	3.50
Cumulative:	44.000	44.000	44.000	26.000	93.40	3.59

Unofficial Transcript

Term: Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	115	LW	Professional Responsibility	A-	2.000	7.40	
LAW	140B	LW	Adv Writing & Practice: Civil	A-	2.000	7.40	
LAW	319	LW	Reg Toxic Subs & Hazard Waste	B+	2.000	6.60	
LAW	413	LW	Remedies	B+	3.000	9.90	
LAW	453	LW	Administrative Law	B+	3.000	9.90	
LAW	754	LW	Judicial Externship	P	2.000	0.00	
LAW	762	LW	W&M Environ Law/Policy Review	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	12.000	41.20	3.43
Cumulative:	59.000	59.000	59.000	38.000	134.60	3.54

Unofficial Transcript

TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	59.000	59.000	59.000	38.000	134.60	3.54
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	59.000	59.000	59.000	38.000	134.60	3.54

Allison Orr Larsen
Professor of Law and Director, Institute of the Bill of Rights Law

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-7985
Fax: 757-221-3261
Email: amlarsen@wm.edu

June 04, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Dana Mirsky

Dear Judge Hanes:

I am a law professor at William and Mary law school and a student of mine, Dana Mirsky, has applied to be your law clerk. I certainly recommend Dana for the job.

I taught Dana in my administrative law class in the spring of 2021, a class with approximately 50 students in it. Dana did well in that class (earning a B plus) and she seemed very engaged in the material throughout the semester. Dana is not one of those students who likes to hear herself talk, but every time she participated in class discussions she shared something valuable and on point. Dana strikes me as bright, responsible, and conscientious. She is quick on her feet, always prepared, and very articulate.

There is one memory I have about Dana that I think is particularly relevant to her clerkship application, and it relates to an interaction we had outside of class. Dana came to my office hours early in the semester as an advocate for her class to ask that the exam be self-scheduled instead of fixed. Her touch in this matter was completely professional – she listened to my concerns (about the short grading deadline before graduation), she articulated her classmates' position about exam conflicts with poise and in a measured way, and she eventually persuaded me to change my mind. Notably I did not change my mind right away, and when Dana left my office, another student might have shown frustration, but not Dana. She did not back down from her position but acknowledged the other side in a respectful way.

What is remarkable about this conversation was not the substance of Dana's concerns (I have heard them all before), but in the way she presented them. Dana was the consummate professional – mature, grounded, strong but not stubborn. I think the interaction I had with Dana bodes very well for her potential as a law clerk: I suspect she would be able to hold her own in difficult discussions while maintaining a calm and measured demeanor. This, I think, will make her a very positive influence in chambers, and I know it will make her a terrifically effective attorney.

In sum, Dana is a bright, articulate, and conscientious law student. I have no doubt she will make a terrific law clerk. Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/

Allison Orr Larsen
Professor of Law and Director, Institute of the Bill of Rights Law
William & Mary Law School
amlarsen@wm.edu; (757) 221-7985

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

DAVID W. LANNETTI
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

May 10, 2021

Re: Letter of Recommendation for Dana Mirsky

I write in support of Dana Mirsky's application to serve as one of your Law Clerks. Dana was one of my Summer 2020 judicial interns in Norfolk Circuit Court. In the Commonwealth of Virginia, circuit courts are the state trial courts of record and are courts of general jurisdiction, hearing everything from civil cases to felony criminal cases to divorces. Circuit courts also hear appeals from both general district courts (civil, traffic, and criminal divisions) and juvenile & domestic relations district courts, which are non-record courts.

Dana spent most days each week during the summer working at the courthouse, where she was of enormous assistance to me. She is an extremely bright individual who has performed extremely well at law school, and she quickly came to understand and contribute toward courthouse operations. Dana conducted legal research to support bench memoranda and judicial letter opinions, interacted with the other seven circuit court judges and their Law Clerks, and observed multiple court proceedings. She interacted directly with my Law Clerk every day and met with me personally most days. I was especially impressed with Dana's intellectual curiosity, her growth during her time with me, and her ability to quickly grasp legal concepts she had not yet encountered at law school. She also proved to be an excellent researcher and writer. Further, her questions always were insightful and demonstrated to me that she fully embraced the internship opportunity and endeavored to learn as much as possible. She was consistently enthusiastic, professional, and a pleasure to work with.

In sum, I believe that Dana would be an excellent Law Clerk, and I hope that you will give her application serious consideration. I have overseen more than twenty-five interns over the past six years, and I can say—without a doubt—that Dana is the one of the best legal interns with whom I have worked.

The Virginia Canons of Judicial Conduct require that I inform you that the opinions in this letter are my personal opinions and should not be mistaken for the official views of the Norfolk Circuit Court or my opinion as a Circuit Court Judge in the context of any specific case. Please feel free to contact me at dlannetti@vacourts.gov if you have any questions or desire any additional information.

Sincerely,

David W. Lannetti

David W. Lannetti
Judge

DANA MIRSKY
2005 Glynn Springs Drive | Williamsburg, Virginia 23188 | (717) 332-1236 | dgmirsky@email.wm.edu

WRITING SAMPLE

I prepared this memorandum during my summer internship with Judge Lannetti at the Norfolk Circuit Court and have obtained his consent to use it as a writing sample. This memorandum is substantially my own work.

D. Mirsky Writing Sample

QUESTION PRESENTED

Whether the Court should sustain the plea in bar filed by Defendant, the City,[1] and dismiss the City as a named defendant in both cases.

BRIEF ANSWER

The Court should sustain the City's plea in bar. Section 15.2-1809 of the *Code of Virginia* grants statutory immunity to cities and towns for injuries resulting from acts or omissions of ordinary negligence committed by employees or agents of that city or town while operating or maintaining a recreational facility operated by that city or town. The complaints[2] allege ordinary negligence against the City and its employee for a motor vehicle accident that occurred while the employee drove a City-owned van during his employment with and in the course of the regular operations of a City-owned recreational facility. The City therefore has immunity pursuant to section 15.2-1809, and the Court should dismiss the City as a defendant.

STATEMENT OF FACTS

On July 26, 2018, Defendant Marshall, while driving a City-owned passenger van, collided with Plaintiffs' car while Plaintiffs were stopped at a red light. (Plea in Bar 1–2.) At the time of the incident, Marshall worked for the City as a Recreation Specialist at the City-run Boxing & Fitness Center ("Boxing Center"). (*Id.* at 2.) The Boxing Center offers recreational boxing programs for both children and adults, in addition to hosting boxing matches and competitions. (*Id.* at 4.) Its amenities include a computer room, a fitness room, and a lounge. (*Id.*) The City assigned the van Marshall was driving to the Boxing Center. (*Id.* at 2.) When the incident occurred, Marshall was driving back to the Boxing Center after taking children home at

[1] Party names have been removed or changed throughout this memorandum in order to preserve confidentiality.
[2] Plaintiffs each submitted a separate complaint, but the complaints are indistinguishable except for the plaintiff's name, the amount of damages requested, and details about Plaintiffs' vehicle. These differences are not relevant to this plea in bar. All complaint citations therefore refer to the same paragraph(s) in each complaint.

the end of boxing practice, a service the Boxing Center offered to boxing program participants for many years. (*Id.* at 2, 8.)

Plaintiffs' Position

Plaintiffs allege that Marshall operated the van "within the course and scope of his employment . . . for and on behalf of" the City and did so "in a negligent and reckless manner." (Compl. ¶¶ 2, 7.) Plaintiffs assert that Marshall "had a duty to operate his vehicle in a safe, reasonable and lawful manner" and that the City "is directly and/or vicariously liable for all wrongful acts or omissions of [Marshall], its employee and agent." (*Id.* at ¶¶ 3, 6.) Plaintiffs ask for monetary damages, alleging that Marshall's negligence and recklessness was the direct and proximate cause of Plaintiffs' injuries and that the City is liable as Marshall's employer. (*Id.* at ¶¶ 8–12.) Plaintiffs have not filed a response to the City's plea in bar.

The City's Position

The City claims statutory immunity pursuant to section 15.2-1809 of the *Code of Virginia*, which limits the liability of cities or towns operating recreational facilities. (Plea in Bar 1.) The City asserts that, as "a place for the entertainment and diversion of the City's residents," the Boxing Center constitutes a recreational facility under the statute. (*Id.* at 3.) It also acknowledges Marshall as an employee or agent of the City. (*Id.* at 5.) The City argues that in returning the City's van to the Boxing Center following the transportation of children involved in Boxing Center activities, "[Marshall] was performing a service/activity in the operation of a recreational facility" (*id.* at 6–7) and specifies that "[t]he recreational facility at issue here is the Boxing Center, not the vehicle that [Marshall] was driving" (*id.* at 3 n.1). The City notes that ordinary negligence "is the only negligence alleged in these actions" and that Plaintiffs named the City as a

defendant "based on its vicarious liability for the acts of [Marshall]." (*Id.* at 9.) The City thus asserts that because the claimed injuries were allegedly caused by the negligent act(s) of an agent of the City during the operation of a City-run recreational facility, the City cannot be held liable pursuant to section 15.2-1809. (*Id.*) The City asks that the Court dismiss the City as a named defendant. (*Id.*) For purposes of this memorandum, it is assumed that the City will present evidence to support its allegations.

DISCUSSION

"A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery," and the burden of proof regarding that issue falls on the moving party. *Hilton v. Martin*, 275 Va. 176, 179, 654 S.E.2d 572, 574 (2008). A court relies on the pleadings and any evidence presented in support or opposition to the plea. *Hawthorne v. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226, 233 (2010). "[W]here no evidence is taken in support of a plea in bar, the trial court . . . consider[s] solely the pleadings in resolving the issue presented." *Lostrangio v. Laingford*, 261 Va. 495, 497, 544 S.E.2d 357, 358 (2001). For purposes of resolving a plea in bar, a court considers the facts in the plaintiff's pleadings to be true. *Id.*

The City claims immunity pursuant to a Virginia statute which provides the following:

> No city or town which operates any park, recreational facility or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person . . . caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such park, recreational facility or playground. Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground.

Va. Code Ann. § 15.2-1809. The Virginia Supreme Court has consistently held that this is an unambiguous statute that clearly establishes that, in the operation or maintenance of a city- or town-run recreational facility, the "city or town is not liable for its agents' and employees' acts of ordinary negligence, but is liable for gross negligence of the same officers or agents." *Seabolt v. Cty. of Albemarle*, 283 Va. 717, 721, 724 S.E.2d 715, 717 (2012); *see also Decker v. Harlan*, 260 Va. 66, 69, 531 S.E.2d 309, 310–11 (2000); *Hawthorn v. City of Richmond*, 253 Va. 283, 287–89, 484 S.E.2d 603, 605–07 (1997); *DePriest v. Pearson*, 239 Va. 124, 137, 387 S.E.2d 480, 481, (1990); *Frazier v. City of Norfolk*, 243 Va. 388, 391, 362 S.E.2d 688, 690 (1987). For a court to grant immunity pursuant to this statute, there must be allegations of (1) acts or omissions of ordinary, not gross, negligence by (2) a city or town and/or that city or town's officer or agent (3) in the operation or maintenance of (4) a recreational facility (5) operated by that city or town.

Here, Plaintiffs bring claims for ordinary negligence only—they do not allege gross negligence. The parties agree that Marshall was driving the van as an employee and agent of the City at the time of the incident, and the City clearly concedes that it operates the Boxing Center. The City argues that, as a "place for the entertainment and diversion of the City's residents," the Boxing Center is a recreational facility as contemplated by section 15.2-1809. The City further asserts that because Marshall was driving a city-owned van on Boxing Center business—and in fact performing a service that was part of the Boxing Center's regular offerings—the incident occurred while operating a recreational facility, so statutory immunity pursuant to section 15.2-1809 therefore applies. Based on a succession of decisions handed down by the Virginia Supreme Court,

this Court should find that the Boxing Center, which provides opportunities for citizen entertainment and diversion, *is* a recreational facility under section 15.2-1809. In addition, the Court should find that because Marshall was driving the van as part of the Boxing Center's normal programming, he was acting in the operation of that recreational facility at the time of the incident. The Court should thus dismiss the City as a defendant in both cases.

A. The Boxing Center is a recreational facility pursuant to section 15.2-1809 of the *Code of Virginia*.

The Court must determine whether the Boxing Center is a recreational facility for purposes of section 15.2-1809.[3] The City correctly points out that although the Virginia Supreme Court held that a bus transporting citizens on a county-sponsored recreational trip was not a recreational facility, that decision was based on the defendant's argument that the statute applied to him because he "was operating a 'recreational facility' at the time the bus overturned." *DePriest*, 239 Va. at 137, 237 S.E.2d at 481. That is, the defendant claimed that the bus *itself* was a recreational facility, not that he drove the bus as part of the *operation* of a separate recreational facility. In the instant case, the City specifically contends that the "recreational facility at issue here is the Boxing Center, not the vehicle that [Marshall] was driving."

The Virginia Supreme Court has established a clear and consistent interpretation of what constitutes a recreational facility for purposes of section 15.2-1809. In *Frazier*, the court defined a "recreational facility" as a place "where members of the public are

[3] The Virginia Supreme Court has, on several occasions, determined that a facility is a recreational facility pursuant to section 15.2-1809 of the *Code of Virginia* without explicitly engaging in the analysis that follows. *See Decker v. Harlan*, 260 Va. 66, 69, 531 S.E.2d 309, 310–11 (2000) (stating that "the Hampton Coliseum is a recreational facility within the intendment of Code § 15.2-1809"); *Chapman v. City of Virginia Beach*, 252 Va. 186, 189, 475 S.E.2d 798, 800 (1996) (concluding that the Virginia Beach boardwalk is a recreational facility, noting that it was "designed for recreational use, whether to access the beach itself or as a promenade for walking along the beach").

entertained and diverted, either by their own activities or by the activities of others." 243 Va. at 392, 362 S.E.2d at 690. The court repeatedly quoted this exact language when applying section 15.2-1809 in a series of subsequent cases. *See, e.g.*, *Lostrangio*, 261 Va. at 499–500, 544 S.E.2d at 359; *Decker*, 260 Va. at 69, 531 S.E.2d at 310–11; *DePriest*, 239 Va. at 137, 387 S.E.2d at 481. To be a recreational facility for purposes of section 15.2-180, the facility in question must provide diversion and entertainment to the public. The City describes the Boxing Center as a location for city residents to participate in boxing programs, observe boxing competitions and matches, and make use of amenities including a computer room, a fitness room, and a lounge. The Boxing Center clearly offers citizens a variety of opportunities to be entertained or diverted through both their own as well as others' activities.

It is also important that the City offers this entertainment and diversion through some physical property that it operates. The Virginia Supreme Court noted in *Lostrangio* that in addressing immunity pursuant to section 15.2-1809, "the 'recreational facility' in question generally has been property owned by a locality with fixed improvements maintained and operated by the locality" and "the term 'facility' contained in Code § 15.2-1809 contemplates something tangible with a purpose of diverting and entertaining the public." 261 Va. at 499–500, 544 S.E.2d at 359. It is not enough that the City is enabling the entertainment of the public; because "facility" is in the statute, the City must offer this diversion to the public via a building or property operated by the City. The Boxing Center is a physical location built with specific amenities to provide entertainment and diversion to city residents through boxing and related activities. The Court should therefore find that the Boxing Center, as a city-owned and operated